

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

Mar 06, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ADAM M.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

No. 4:22-cv-5027-EFS

**ORDER GRANTING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION,
DENYING DEFENDANT'S
SUMMARY-JUDGMENT MOTION,
AND REMANDING FOR FURTHER
PROCEEDINGS**

Plaintiff Adam M. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the ALJ failed to provide adequate reasons supported by substantial evidence for discounting Plaintiff's symptom reports, the Court reverses the ALJ's decision and remands this matter for further proceedings.

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¹ For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

I. Five-Step Disability Determination

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2 A five-step evaluation determines whether a claimant is disabled.² Step one
3 assesses whether the claimant is engaged in substantial gainful activity.³ Step two
4 assesses whether the claimant has a medically severe impairment or combination
5 of impairments that significantly limit the claimant's physical or mental ability to
6 do basic work activities.⁴ Step three compares the claimant's impairment or
7 combination of impairments to several recognized by the Commissioner to be so
8 severe as to preclude substantial gainful activity.⁵ Step four assesses whether an
9 impairment prevents the claimant from performing work he performed in the past
10 by determining the claimant's residual functional capacity (RFC).⁶ Step five
11 assesses whether the claimant can perform other substantial gainful work—work
12 that exists in significant numbers in the national economy—considering the
13 claimant's RFC, age, education, and work experience.⁷
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17 ² 20 C.F.R. §§ 404.1520(a), 416.920(a).

18 ³ *Id.* §§ 404.1520(a)(4)(i), (b), 416.920(a)(4)(i), (b).

19 ⁴ *Id.* §§ 404.1520(a)(4)(ii), (c), 416.920(a)(4)(ii), (c).

20 ⁵ *Id.* §§ 404.1520(a)(4)(iii), (d), 416.920(a)(4)(iii), (d).

21 ⁶ *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

22 ⁷ *Id.* §§ 404.1520(a)(4)(v), (g), 416.920(a)(4)(v), (g).

1 **II. Background**

2 In August 2017, Plaintiff filed an application for benefits under Title 16,
3 claiming disability based on hearing loss in both ears, scoliosis in the mid-to-lower
4 back, attention deficit hyperactivity disorder (ADHD), depression, and anxiety.⁸
5 Plaintiff alleged an onset date of March 14, 2014.⁹ After the agency denied his
6 applications initially and on reconsideration,¹⁰ Plaintiff requested a hearing before
7 an ALJ.

8 **A. 2019 Hearing & Decision**

9 In June 2019, ALJ Mark Kim held a hearing at which Plaintiff and a
10 vocational expert testified.¹¹ In July 2019, the ALJ issued a written decision
11 denying disability.¹² However, after finding that the ALJ had not adequately
12 addressed Plaintiff's mental-health treatment records, the Appeals Council vacated
13 the ALJ's decision and remanded the case for further proceedings.¹³ The Appeals
14 Council directed the ALJ to "[g]ive further consideration to the claimant's
15 maximum residual functional capacity during the entire period at issue and
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17 ⁸ AR 352–61, 418.

18 ⁹ AR 18, 434.

19 ¹⁰ AR 168–83, 184–99.

20 ¹¹ AR 85–112.

21 ¹² AR 203–14.

22 ¹³ AR 45–48.

1 provide rationale with specific references to evidence of record in support of
2 assessed limitations.”¹⁴

3 **B. 2021 Hearing & Decision**

4 In January 2021, on remand, the ALJ held another hearing at which
5 Plaintiff and a vocational expert testified.¹⁵ In February 2021, the ALJ issued a
6 written decision again denying Plaintiff’s disability application.¹⁶ As to the
7 sequential disability analysis, the ALJ found:

- 8 • Step one: Plaintiff had not engaged in substantial gainful activity since
9 August 16, 2017, the application date.
- 10 • Step two: Plaintiff had the following medically determinable severe
11 impairments: scoliosis of the lumbar and thoracic spine, hearing loss,
12 depressive disorder, anxiety disorder, ADHD, personality disorder, and
13 learning disorder.
- 14 • Step three: Plaintiff did not have an impairment or combination of
15 impairments that met or medically equaled the severity of one of the
16 listed impairments.

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20 ¹⁴ AR 47–48.

21 ¹⁵ AR 113–39.

22 ¹⁶ AR 18–30.

- 1 • RFC: Plaintiff had the RFC to perform medium work, except,
2 he is limited to occupations that do not require fine hearing
3 capabilities; must avoid excessive noise in excess of regular
4 traffic noise or moderate level; must avoid hazards such as
5 dangerous moving machinery and unprotected heights; can
6 perform simple, routine, unskilled tasks with a reasoning level
7 of 3 or less; is limited to work involving only occasional and
8 simple changes, and that do not require fast-paced type tasks;
9 is limited to work involving no interaction with the public,
10 including no working with crowds; and is limited to work
11 involving only occasional superficial interaction with
12 coworkers.¹⁷
- 8 • Step four: Plaintiff had no past relevant work.
- 9 • Step five: considering Plaintiff’s RFC, age, education, and work history,
10 Plaintiff could perform work that existed in significant numbers in the
11 national economy, such as industrial cleaner, hospital cleaner, and hand
12 packager.¹⁸

13 In reaching his decision, the ALJ did not consider any of the medical
14 opinions to be particularly persuasive, finding “somewhat persuasive” only the
15 opinion of Dan Donahue, PhD, a state-agency psychological consultant who
16 reviewed Plaintiff’s file and opined as to his mental RFC in October 2017.¹⁹ The
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19 ¹⁷ AR 24.

20 ¹⁸ AR 30.

21 ¹⁹ AR 26–27. *See also* AR 179–81 (Dr. Donahue’s opinion as to Plaintiff’s mental
22 RFC)

1 ALJ found all other medical sources of record unpersuasive, including the
2 following:

- 3 • James Irwin, MD, a state-agency medical consultant who reviewed
4 Plaintiff's file and opined as to his physical RFC in December of 2017;²⁰
- 5 • John Robinson, PhD, a state-agency medical consultant who reviewed
6 Plaintiff's file and opined as to his mental RFC in December of 2017;²¹
- 7 • Christina Moore, ARNP, a treating provider who filled out a physical
8 functional evaluation on behalf of Plaintiff in May 2019;²²
- 9 • David Morgan, PhD, an examining psychologist who conducted a
10 psychological evaluation of Plaintiff in May of 2019;²³
- 11 • Ken Owens, Plaintiff's treating mental-health therapist, who filled out a
12 mental-source statement on behalf of Plaintiff in May of 2019;²⁴ and
- 13 • N.K. Marks, PhD, an examining psychologist who performed psychological
14 evaluations of Plaintiff in September 2014, October 2016, and June 2017.²⁵

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16 ²⁰ AR 192–94.

17 ²¹ AR 192–94.

18 ²² AR 714–16 (duplicated at AR 740–42).

19 ²³ AR 707–11.

20 ²⁴ AR 733–36.

21 ²⁵ AR 613–19, 627–34. The ALJ did not specifically address the persuasiveness of

22 Dr. Marks. Instead, the ALJ erroneously implied that Dr. Marks' opinions are
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1 The ALJ also found Plaintiff’s medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms, but his statements
3 concerning the intensity, persistence, and limiting effects of those symptoms were
4 “not entirely consistent with the medical evidence and other evidence in the
5 record.”²⁶

6 Plaintiff requested review of the ALJ’s decision by the Appeals Council,
7 which denied review.²⁷ Plaintiff timely appealed to the Court.²⁸

8 III. Standard of Review

9 A district court’s review of the Commissioner’s final decision is limited.²⁹
10 The Commissioner’s decision is set aside “only if it is not supported by substantial
11 evidence or is based on legal error.”³⁰ Substantial evidence is “more than a mere
12 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
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15 “inherently neither valuable nor persuasive” under 20 C.F.R. § 416.920b(c). AR 28.
16 *See also* 20 C.F.R. § 416.920b(c) (setting forth categories of evidence that are
17 deemed “inherently neither valuable nor persuasive”).

18 ²⁶ AR 25.

19 ²⁷ AR 1–6.

20 ²⁸ *See* 20 C.F.R. §§ 404.981, 416.1481, 422.201.

21 ²⁹ 42 U.S.C. § 405(g).

22 ³⁰ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

1 mind might accept as adequate to support a conclusion.”³¹ Because it is the role of
2 the ALJ to weight conflicting evidence, the Court upholds the ALJ’s findings “if
3 they are supported by inferences reasonably drawn from the record.”³² Further,
4 the Court may not reverse an ALJ decision due to a harmless error—one that “is
5 inconsequential to the ultimate nondisability determination.”³³

6 IV. Analysis

7 Plaintiff first argues that the ALJ improperly rejected Plaintiff’s symptom
8 testimony.

9 A. Symptom Reports: Plaintiff shows consequential error.

10 As there is no affirmative evidence of malingering, after considering the
11 relevant factors, the ALJ was required to provide specific, clear, and convincing
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13 ³¹ *Hill*, 698 F.3d at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir.
14 1997)).

15 ³² *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). *See also Lingenfelter v.*
16 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must consider the entire
17 record as a whole, weighing both the evidence that supports and the evidence that
18 detracts from the Commissioner’s conclusion,” not simply the evidence cited by the
19 ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998)
20 (“An ALJ’s failure to cite specific evidence does not indicate that such evidence was
21 not considered[.]”).

22 ³³ *Molina*, 674 F.3d at 1115 (cleaned up).
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1 reasons—supported by substantial evidence—for rejecting Plaintiff’s symptom
2 reports.³⁴ As explained below, the ALJ failed to meet this standard.

3 **1. Hearing Loss**

4 As a preliminary matter, Plaintiff seemingly challenges the ALJ’s findings
5 regarding hearing loss.³⁵ But the ALJ accurately noted in his decision that
6 Plaintiff “reported that he uses hearing aids and has trouble hearing some
7 conversation with background noise.”³⁶ The ALJ’s decision reflects he accepted
8 Plaintiff’s hearing-loss claims, as he crafted an RFC limited to jobs that do not
9 require fine-hearing capabilities and which avoid excessive noise as well as
10 hazards such as dangerous machinery.³⁷ Plaintiff does not articulate any
11 additional hearing-based limitations that the ALJ should have included in the
12 RFC. The Court therefore finds no error in this regard.

15 ³⁴ See *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); see also 20 C.F.R.
16 §§ 404.1529(c), 416.929(c); SSR 16-3p, 2016 WL 1119029, at *7.

17 ³⁵ See ECF No. 11 at 5 (“The ALJ’s only reason for rejecting Moore’s claim of
18 bilateral hearing loss and scoliosis with back pain are some normal examination
19 findings, including normal straight leg raise tests, normal ambulation, and no
20 sensory deficits.”).

21 ³⁶ AR 25.

22 ³⁷ AR 24.

1 **2. Scoliosis with Back Pain**

2 Plaintiff testified that his mid-to-lower back hurts all the time (“no matter
3 what”) and nothing provides relief.³⁸ He said that because of his scoliosis and back
4 pain, he can sit for only about an hour and stand for only about 15 minutes at a
5 time.³⁹ Plaintiff also testified that he is limited to lifting a maximum of 25
6 pounds.⁴⁰

7 The ALJ rejected Plaintiff’s scoliosis-related testimony. The ALJ pointed to
8 benign findings upon examination, namely normal results for straight leg raises,
9 ambulation, toe and heel walking, gait and station, and range of motion of the
10 thoracic spine, as well as findings of no sensory deficits and no acute distress.⁴¹
11 The ALJ also highlighted that when Plaintiff received treatment for back pain, he
12 was advised to take Tylenol as needed and to perform back exercises and stretches

16 ³⁸ AR 96–97, 121.

17 ³⁹ AR 125.

18 ⁴⁰ AR 126.

19 ⁴¹ AR 25. The ALJ also cited to a May 2019 examination that “revealed no
20 abnormalities.” *Id.* But that treatment note is of little support to the ALJ, as the
21 musculoskeletal portion of the examination merely states, “*Visual* overview of all
22 four *extremities* is normal.” AR 723 (emphasis added).

1 at home.⁴² The ALJ's proffered reasons are valid in theory but lack sufficient
2 support and explanation.

3 a. Benign Medical Findings

4 Medical findings may serve as a clear and convincing reason to discount a
5 claimant's testimony, but only if such medical findings are truly inconsistent with
6 specifically identified testimony.⁴³ The ALJ did not explain why the identified
7 findings are inconsistent with Plaintiff's testimony that his back pain causes
8 limitations in sitting, standing, and lifting.⁴⁴ After all, it is undisputed that
9 Plaintiff has scoliosis; the ALJ found it to be a medically determinable severe
10 impairment, and the diagnosis has been confirmed by medical imaging.⁴⁵ But

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12 ⁴² AR 25.

13 ⁴³ See 20 C.F.R. §§ 404.1529(c)(3)–(4) 416.929(c)(3)–(4).

14 ⁴⁴ In assessing Plaintiff's physical impairments, ALJ also repeatedly cited a finding
15 of "mild dysarthria," and it is unclear whether the ALJ considered this to
16 undermine Plaintiff's testimony and/or any of the medical opinions. See AR 25, 26.

17 Dysarthria is described by the National Institute on Deafness and Other
18 Communication Disorders as a "group of speech disorders caused by disturbances
19 in the strength or coordination of the muscles of the speech mechanism as a result
20 of damage to the brain or nerves." NIH, *Dysarthria*,
21 <https://www.nidcd.nih.gov/glossary/dysarthria> (accessed Feb. 17, 2023).

22 ⁴⁵ AR 21, 599–602.

1 neither the Court nor the ALJ qualify as medical experts, and the ALJ found all
2 the medical opinions regarding the limiting effects of Plaintiff's scoliosis to be
3 unpersuasive.⁴⁶ Without more, the ALJ's implied finding that the cited findings
4 are inconsistent with Plaintiff's testimony is not supported by substantial evidence
5 or sufficient explanation.

6 *b. Conservative Treatment of Physical Impairments*

7 "Evidence of 'conservative treatment' is sufficient to discount a claimant's
8 testimony regarding severity of an impairment."⁴⁷ Substantial evidence supports
9 the ALJ's implied finding that Plaintiff pursued and received only conservative
10 treatment for his back pain.⁴⁸ Yet, the ALJ did not address whether Plaintiff's
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12 ⁴⁶ See *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975). As an example of an
13 issue likely needing medical expertise, Plaintiff argues on appeal that a straight
14 leg raise test "looks for lumbar nerve root irritation, not pain due to scoliosis." See
15 ECF No. 11 at 6. But the record lacks any evidence which allows the Court to
16 assess this assertion.

17 ⁴⁷ *Parra v. Astrue*, 481 F.3d 742, 750–51 (9th Cir. 2007) (upholding the rejection of
18 the claimant's pain-severity testimony where the ALJ "noted that [the claimant]'s
19 physical ailments were treated with an over-the-counter pain medication").

20 ⁴⁸ See, e.g., AR 625 (Jan. 2017: "noncompliant with referral last year to PT/ortho
21 . . . noncompliance with recommendations supports that the patient does not feel
22 that his pain is bad enough to get assistance"); AR 683 (April 2019: advising
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1 conservative treatment could be explained by reasons other than his back pain
2 being less severe than he claimed. Notably, both medical records cited by the ALJ
3 relate to Plaintiff establishing care with a new physician.⁴⁹ Based on logic and
4 common experience, one would reasonably expect a doctor who is just beginning to
5 treat a new patient to recommend conservative care—at least to start—before
6 progressing to more aggressive treatment options.

7 More importantly, Plaintiff offered potential explanations for the lack of
8 increased treatment. Plaintiff testified that when he got clean and sober after
9 suffering from a drug addiction, he decided against “all kinds of medication,” which
10 presumably includes prescription-level pain killers.⁵⁰ Plaintiff further said he is
11 “not a big fan of doctors” and does not trust them because of bad experiences when
12 undergoing surgery as a child.⁵¹ He also indicated he cannot afford “any kind of
13 stuff medically.”⁵²

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16 Plaintiff to take Tylenol as needed and to do home-based back stretches for back
17 pain); AR 739 (Nov. 2020: advising Plaintiff to perform back stretches and to take
18 Tylenol as needed, and referring Plaintiff to physical therapy).

19 ⁴⁹ AR 25, 26 (repeatedly citing AR 679, 682–83, 738–39).

20 ⁵⁰ See AR 123.

21 ⁵¹ AR 99.

22 ⁵² AR 99.

1 Under these circumstances, the Court cannot dismiss as harmless the ALJ's
2 failure to address potential alternative explanations for Plaintiff's conservative
3 level of care. The ALJ therefore failed to provide clear and convincing reasons
4 supported by substantial evidence for rejecting Plaintiff's back-pain symptom
5 testimony.

6 **3. Hernia**

7 Plaintiff testified that he has an inguinal hernia that will "flare up" if he
8 spends "too much time walking."⁵³ Plaintiff's hernia is documented in the medical
9 records.⁵⁴ And the ALJ inquired about it at the January 2021 hearing.⁵⁵ Yet, the
10 ALJ's written decision did not address—or even mention—Plaintiff's hernia.

11 The ALJ's oversight is consequential. The ALJ assessed Plaintiff as capable
12 of performing medium work without any walking-related limitations.⁵⁶ Medium
13 work includes jobs requiring "a good deal of walking."⁵⁷ Each of the three
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15 ⁵³ AR 97.

16 ⁵⁴ *See, e.g.*, AR 582 (April 2016: "large inguinal hernia needs to be repaired before it
17 worsens and causes an emergency"); AR 594, 596 (Jan. 2015: physical exam
18 positive for left inguinal hernia, but "pt declined general surgery referral"); AR 738
19 (same).

20 ⁵⁵ AR 97–98.

21 ⁵⁶ *See* AR 24. *Cf.* AR 98 ("I don't do a lot of walking, so it doesn't bother me.").

22 ⁵⁷ *See* 20 C.F.R. §§ 404.1567(b)–(c), 416.967(b)–(c).
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1 representative occupations listed by the ALJ are defined as medium work, and the
2 Dictionary of Occupational Titles does not indicate that any of the three
3 occupations inherently involve less walking.⁵⁸

4 **4. Mental-Health Impairments**

5 Regarding his depression, Plaintiff testified that his depression left him with
6 no drive or motivation. He said, “There are days where I don’t take care of myself.
7 I don’t get out of bed for hours.”⁵⁹ He indicated this occurred “at least weekly” and
8 that, on average, he stayed mostly in bed for 3–4 days per week.⁶⁰ Plaintiff also
9 testified that although he can be sociable in one-on-one settings, he has problems
10 with crowds, giving a full city bus as an example of a setting with too many
11 people.⁶¹

12 In discounting Plaintiff’s mental-health symptom testimony, the ALJ noted
13 that Plaintiff was not currently undergoing counseling and has not taken mental-
14 health medications for years.⁶² The ALJ also recited a treatment history and cited

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16 ⁵⁸ See AR 30; see also U.S. Dep’t of Labor, *Dictionary of Occupational Titles* at
17 381.687-018 (Cleaner, Industrial), 1991 WL 673258; *id.* at 323.687-010 (Cleaner,
18 Hospital) 1991 WL 672782; *id.* at 920.587-018 (Packager, Hand), 1991 WL 687916.

19 ⁵⁹ AR 93.

20 ⁶⁰ AR 94, 122–23.

21 ⁶¹ AR 93–94, 122.

22 ⁶² AR 24–25.

1 to treatment notes including benign mental-status findings, Plaintiff's self-reported
2 activities, and later reports by Plaintiff that he was doing well.⁶³ Thus, fairly read,
3 the ALJ's decision also includes implied findings that Plaintiff's symptom
4 testimony was inconsistent with the cited treatment notes.

5 *a. Conservative Treatment of Mental-Health Impairments*

6 For the same reasons discussed above regarding Plaintiff's physical-
7 impairment symptom testimony, on this record—absent additional explanation
8 and/or evidence—a lack of prescription mental-health medications is not a
9 convincing reason to discount Plaintiff's mental-health symptom testimony.⁶⁴

10 Additionally, Plaintiff implied that the reason he was no longer receiving
11 counseling was because of “the COVID shutdown.”⁶⁵ Finally, “it is a questionable
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13 ⁶³ AR 25.

14 ⁶⁴ See *Garrison v. Colvin*, 759 F.3d 995, 1018 n.24 (9th Cir. 2014) (holding an ALJ
15 may not reject a claimant's symptom testimony based on a lack of treatment if “the
16 record affords compelling reason to view such departures from prescribed
17 treatment as part of claimants' underlying mental afflictions”). Psychologists who
18 evaluated Plaintiff indicated Plaintiff may have been self-medicating by drinking
19 excessive amounts of Pepsi. See AR 613, 635, 662; see also AR 628 (April 2010: “He
20 was noted to have seriously decayed teeth, bad breath. He had a history of past
21 drug use, none recently, drank a lot of Pepsi.”).

22 ⁶⁵ AR 119.

1 practice to chastise one with a mental impairment for the exercise of poor
2 judgment in seeking rehabilitation.”⁶⁶ To reject Plaintiff’s mental-health testimony
3 based on a conservative level of care, the ALJ was required to provide a more
4 meaningful explanation, supported by substantial evidence, as to why the potential
5 alternative reasons found in the record do not sufficiently explain Plaintiff’s type
6 and degree of treatment.

7 *b. Treatment Notes Containing Self-Reports*

8 Throughout the ALJ’s analysis of Plaintiff’s mental impairments, the ALJ
9 relied on a certain set of treatment notes.⁶⁷ Describing Plaintiff’s mental
10 impairments, the ALJ acknowledged that “the record demonstrates a history of
11 ADHD, depression, anxiety, and learning disorder.”⁶⁸ The ALJ then recited
12 Plaintiff’s treatment history, starting in April 2019.

13 *i. Mental-Status Results from April 2019*

14 Citing to a single April 23, 2019 treatment note, the ALJ stated that
15 Plaintiff “complained of depressed mood, low energy, anxiety, and irritability,” but
16 “[a]n examination demonstrated average eye contact, a cooperative attitude, a
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18 ⁶⁶ *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1209–1300 (9th Cir.
19 1999).

20 ⁶⁷ See AR 22–23, 25, 27–28 (repeatedly referring to the same set of treatment
21 notes).

22 ⁶⁸ AR 25 (cleaned up).
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1 euthymic mood with a full affect, logical thought processes, normal thought
2 content, normal cognition, estimated average intelligence, and normal insight and
3 judgment.”⁶⁹ The ALJ’s repeated reliance on this one examination is problematic
4 for a few reasons.⁷⁰

5 An ALJ may validly consider discrepancies between a claimant’s reported
6 symptoms and the observations of treatment providers.⁷¹ While one could
7 reasonably infer that someone experiencing severe depression and/or anxiety would
8 be more likely to exhibit an abnormal mood and affect, that is not necessarily true
9 for the other normal findings which the ALJ apparently found important. As
10 courts have repeatedly noted, “the treatment records must be viewed in light of the
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12 ⁶⁹ AR 25 (citing AR 674–76). *See also* AR 22–23 (citing the same in analyzing the
13 Paragraph B criteria of understanding, remembering, and applying information;
14 interacting with others; concentrating, persisting, or maintain pace; and adapting
15 or managing oneself); AR 27–28 (citing the same in assessing the opinions of
16 Dr. Donahue, Dr. Morgan, and Mr. Owens). Elsewhere, the ALJ also cited to a
17 May 2019 mental-status exam performed by Dr. Morgan, but only once and in the
18 context of assessing Dr. Morgan’s medical opinion. *See* AR 27 (citing AR 711).

19 ⁷⁰ Notably, the ALJ’s recitation is accurate but omits that the treating provider
20 indicated he had not used any “evidence-based screening tool(s)” in assessing
21 Plaintiff’s mental health. AR 674.

22 ⁷¹ *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).
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1 overall diagnostic record,” and a claimant’s reports of suffering from severe
2 depression and/or anxiety are not necessarily inconsistent with that claimant also
3 presenting with normal cognitive abilities, such as “good eye contact, organized and
4 logical thought content, and focused attention.”⁷² The ALJ gave no explanation for
5 why Plaintiff’s claimed mental-health symptoms and limitations are inconsistent
6 with him demonstrating average eye contact, a cooperative attitude, and/or
7 cognitive abilities within normal limits.

8 Further, though the record reflects Plaintiff frequently presented at other
9 appointments with a normal mood and affect, there are also records of him
10 presenting as depressed, anxious, and/or fatigued.⁷³ Because the record contains
11 such mixed evidence, it was improper for the ALJ to rely on a single mental-status
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15 ⁷² See, e.g., *Ghanim*, 763 F.3d at 1164 (finding the ALJ erred by rejecting the
16 claimant’s symptoms resulting from anxiety and depressive disorder on the basis
17 that the claimant performed cognitively well during examination and was
18 described as “upbeat,” “smiling very brightly,” and “more talkative about positive
19 things”).

20 ⁷³ Compare, e.g., AR 646, 675, 682, 711, 723, 738 (each indicating a normal mood
21 and affect) with, e.g., AR 617, 633, 653 (each indicating an irregular mood and/or
22 affect).
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1 exam to imply a broad and consistent pattern.⁷⁴ Moreover, the record contains at
2 least some evidence suggesting that Plaintiff does not always present with a mood
3 and affect consistent with the severity of his symptoms.

4 In August 2014, Plaintiff attempted suicide by jumping out a car traveling
5 60–65 mph, and he was brought by ambulance to the emergency department. Even
6 while treating his injuries and summoning the crisis response unit, the emergency-
7 department personnel noted Plaintiff’s presentation as “normal affect, no emotional
8 distress noted.”⁷⁵ Then, when the crisis response unit assessed Plaintiff, the
9 examiner noted, “He was pleasant, had good eye contact, and was cooperative.”⁷⁶
10 Such evidence raises the question of whether Plaintiff may present to many as
11 having a normal mood and/or affect even when he is suffering from severe
12 depression or anxiety.

13 Given the above, additional explanation—and likely additional medical-
14 expert evidence—is needed for the Court to ascertain whether the normal mental-
15 status findings cited by the ALJ provide a reasonable basis for discounting
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17 ⁷⁴ See *Garrison*, 759 F.3d at 1018 (“While ALJs obviously must rely on examples to
18 show why they do not believe that a claimant is credible, the data points they
19 choose must in fact constitute examples of a broader development to satisfy the
20 applicable ‘clear and convincing’ standard.”).

21 ⁷⁵ AR 494.

22 ⁷⁶ AR 503.

1 Plaintiff's mental-health symptom reports.⁷⁷ On this record, the ALJ's proffered
2 reason is neither clear nor convincing; nor is it supported by substantial evidence.

3 ***ii. Reported Activities from 2019***

4 The ALJ called attention to Plaintiff's reported activities from May through
5 December 2019, citing five treatment notes from that period.

6 [In early May], the claimant reported that he was excited that he was
7 able to get tickets for a wrestling event. In late May of 2019, the
8 claimant reported that he was able to get out four days last week,
9 including attending a live wresting event.⁷⁸ A week later, the
10 claimant reported that he was so exhausted "from running around"

11 ⁷⁷ See *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988) (requiring the ALJ to
12 identify the evidence supporting the found conflict to permit the Court to
13 meaningfully review the ALJ's finding); see also *Day*, 522 F.2d at 1156 (recognizing
14 that an ALJ is "not qualified as a medical expert" and should not go outside the
15 record for purposes of "making his own exploration and assessment as to the
16 claimant's [mental] condition").

17 ⁷⁸ Although the error is likely inconsequential, in the May 2019 treatment note to
18 which the ALJ cites, it does not appear that Plaintiff reported attending "a live
19 wresting event." Rather, Plaintiff reported housesitting briefly for a woman,
20 saying, "while she went to work . . . I got to watch SmackDown live[,] WWE[,] [and]
21 History Channel[;] it was fun since I don't have cable." AR 696. This suggests
22 Plaintiff was referring to watching the Smackdown event on television. See
23 <https://www.fox.com/wwe-friday-night-smackdown/> (listing television airtimes).

1 that he decided to stay home over the weekend⁷⁹ In June of 2019,
2 he reported that he had been getting out to pay bills. Therapy records
3 from October of 2019 noted that the claimant had recently gone out
4 with his girlfriend and her mother. In December of 2019, the
5 claimant reported that he was mostly staying home and only going out
6 for groceries.⁸⁰

7 It is unclear how any of the activities identified by the ALJ are inconsistent
8 with Plaintiff's testimony that his mental impairments caused him to stay at home,
9 mostly in bed, 1–4 days per week on average.⁸¹ Rather, the record reflects that—
10 mirroring his testimony—Plaintiff consistently reported getting out of the house
11 only a few times per week.⁸² More, the content and tenor of the treatment notes at

12 ⁷⁹ The ALJ did not explain, and it is not clear from the record, what Plaintiff meant
13 by “running around.” Absent more information, this report is too vague to
14 reasonably be considered inconsistent with Plaintiff's symptom testimony.

15 ⁸⁰ AR 25 (cleaned up).

16 ⁸¹ See AR 93–94, 122–23.

17 ⁸² See, e.g., AR 701 (May 7, 2019: Plaintiff reporting that he had not “not really”
18 gotten out other than to pick up his tickets, and his therapist inquiring about “how
19 will he manage when he as to go to this wresting event”); AR 696 (May 22, 2019:
20 Plaintiff reporting he “was able to get out four days last week,” to which his
21 therapist “praised him and asked how did he feel”); AR 753 (June 10, 2019:
22 Plaintiff reporting getting out but indicating it was limited to paying bills); AR 750
23 (Oct. 2019: Plaintiff reporting going out with his girlfriend and her mother for his

1 that time suggest that each of the identified activities was viewed as an
2 accomplishment—a remarkable event rather than a common occurrence. Where a
3 claimant’s reported activities do not contradict his symptom testimony, the ALJ
4 may reject such symptom testimony only upon making “specific findings relating to
5 the daily activities and their transferability” to a work setting.⁸³

6 The ALJ erred by rejecting Plaintiff’s mental-health symptom testimony
7 based on his reported activities without articulating any meaningful inconsistency.
8 On this record, the ALJ’s proffered reason is neither clear nor convincing; nor is it
9 supported by substantial evidence.

10 ***iii. Self-Reports of Doing Well from 2020***

11 Last, the ALJ went on to cite two of the more-recent treatment notes from
12 Plaintiff’s therapy sessions indicating he was doing well. The ALJ wrote,

13 Treatment records from early 2020 noted that the claimant reported
14 “doing awesome” and that he was staying at home and playing video

15 birthday, indicating he was relieved that “it turned out to be okay”); AR 758 (Dec.
16 2019: Plaintiff reporting “nothing[’]s really changed” and that he leaves only when
17 he needs groceries and then returns back home).

18 ⁸³ See *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); See also *Vertigan v. Halter*,
19 260 F.3d 1044, 1050 (9th Cir. 2001) (The Ninth Circuit has “repeatedly asserted
20 that the mere fact that a plaintiff has carried on certain daily activities, such as
21 grocery shopping, driving a car, or limited walking for exercise, does not in any way
22 detract from [his] credibility as to [his] overall disability.”).

1 games. Overall, he reported that everything had “been going good.”
2 More recently, in late May of 2020, the claimant stated that “other
3 than being bored” he was “doing okay”, that he was trying to keep
4 himself busy playing video games, and that he was trying to spend
5 time with his friend. Additionally, he reported that he was only going
6 out for groceries.⁸⁴

7 “[E]vidence of medical treatment successfully relieving symptoms can
8 undermine a claim of disability,” and an ALJ may discount a claimant’s reported
9 symptoms if they sufficiently improved with treatment.⁸⁵ However, when
10 presented with evidence of mental-health improvement, it can sometimes be
11 difficult to determine whether such improvement is attributable to the treatment
12 being administered or the inherent tendency of mental-health symptoms to wax
13 and wane.⁸⁶ Further, simply because a claimant shows some improvement does
14 not mean that his symptoms have improved to point where they no longer preclude
15 competitive employment.⁸⁷ As such, for evidence of successful treatment to provide

16 ⁸⁴ AR 25–26 (cleaned up).

17 ⁸⁵ See *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017). See also 20 C.F.R.
18 §§ 404.1529(c)(3), 416.913(c)(3); *Morgan v. Comm’r of Social Sec. Admin.*, 169 F.3d
19 595, 599–600 (9th Cir. 1999) (considering evidence of improvement).

20 ⁸⁶ See, e.g., *Wellington*, 878 F.3d at 876; *Garrison*, 759 F.3d at 1017 (“Cycles of
21 improvement and debilitating symptoms are a common occurrence. . .”).

22 ⁸⁷ See *Garrison*, 759 F.3d at 1017 (citing *Holohan v. Massanari*, 246 F.3d 1195,
23 1205 (9th Cir. 2001)).

1 a valid basis for an ALJ to reject the claimant’s mental-health symptom reports,
2 the evidence must demonstrate that (1) the relief is lasting, and (2) the type and
3 degree of relief are such that it is truly at odds with the symptom reports being
4 rejected.⁸⁸

5 Here, the earliest record cited by the ALJ is a treatment note from January
6 2020,⁸⁹ though the record reflects that Plaintiff similarly reported “doing good
7 overall” as early as October 2019.⁹⁰ Given the recency of these treatment notes and
8 the fact that Plaintiff filed his application in August 2017, the ALJ’s reasoning does
9 not speak to the entirety of the relevant period.⁹¹ Even if Plaintiff’s self-reports
10 were sufficient to show he was not disabled from late 2019 to early 2020, the
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14 ⁸⁸ See *Garrison*, 759 F.3d at 1017–18; see also *Reddick v. Chater*, 157 F.3d 715, 723
15 (9th Cir. 1998) (recognizing that an ALJ must account for the context of the
16 claimant’s prior report as well as the nature of his impairment and its symptoms).

17 ⁸⁹ AR 25 (citing AR 772).

18 ⁹⁰ AR 755.

19 ⁹¹ See *Smith v. Kijakazi*, 14 F.4th 1108, 1113 (9th Cir. 2021) (holding that the
20 claimant’s testimony “could not be discredited as a whole because of changes over
21 time or inconsistencies relevant only to portions of testimony describing a certain
22 period”).
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1 treatment notes relied upon by the ALJ would not foreclose the possibility of
2 Plaintiff nonetheless qualifying for a closed period of disability.⁹²

3 The latest treatment note regarding Plaintiff's self-reports of doing well is
4 from May 2020.⁹³ But the record lacks any medical opinions or other medical
5 evidence informing the issue of whether—given Plaintiff's specific mental
6 impairments—this is a sufficiently long period to attribute Plaintiff's reported
7 relief to successful treatment rather than a natural, and temporary, waning of his
8 mental-health symptoms. Still, even assuming the duration to be sufficient, the
9 same therapy notes from that period also reflect that Plaintiff continued to report
10 mostly staying within the confines of his house.⁹⁴ Moreover, reports of “doing well”
11 in the context of mental-health treatment do not necessarily speak to any objective
12 level of functioning.⁹⁵ Accordingly, the treatment notes on which the ALJ relied,

14 ⁹² See 42 U.S.C. § 1382c (providing that claimants may generally receive benefits
15 for any period of disability lasting, or expected to last, at least 12 months).

16 ⁹³ AR 779–80; *see also* AR 25–26 (citing the same).

17 ⁹⁴ See AR 758 (Dec. 2019: Plaintiff reporting going out only to buy groceries);
18 AR 772 (Jan. 2020: Plaintiff reporting “doing okay” overall, but in the context of
19 staying at home playing video games); AR 774 (May 2020: Plaintiff reporting
20 “doing okay,” but in the context of going out only for groceries).

21 ⁹⁵ See *Orn*, 495 F.3d at 634; *see also Garrison*, 759 F.3d at 1017 (quoting with
22 approval *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001) (“We also believe
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1 despite showing improvement/relief, are also nonetheless consistent with Plaintiff's
2 testimony that his mental impairments kept him at home 1–4 days in an average
3 week.⁹⁶

4 On this record, Plaintiff's relatively recent self-reports of doing well did not
5 serve as a clear or convincing reason for the ALJ to reject Plaintiff's mental-health
6 symptom testimony.

7 *c. Consequential Error*

8 The ALJ relied upon evidence of normal mental-status results, Plaintiff's
9 limited activities, and Plaintiff's recent self-reports of doing well in a therapy
10 context, yet the ALJ failed to adequately explain how such evidence could
11 undermine any of Plaintiff's symptom testimony. The ALJ therefore failed to
12 provide any specific, clear, and convincing reason, supported by substantial
13 evidence, for rejecting Plaintiff's symptom testimony. Vocational-expert testimony
14 establishes that if Plaintiff's testimony had been fully credited—particularly his
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18 that the Commissioner erroneously relied too heavily on indications in the medical
19 record that [the claimant] was 'doing well,' because doing well for the purposes of a
20 treatment program has no necessary relation to a claimant's ability to work or to
21 [his] work-related functional capacity.”)).

22 ⁹⁶ See AR 93–94, 122–23.

1 testimony regarding his mental impairments being sufficiently severe to keep him
2 from leaving his house on a weekly basis—he would have been found disabled.⁹⁷

3 **B. Medical Opinions: Plaintiff shows error.**

4 Reversal is already required based on the ALJ's errors in assessing
5 Plaintiff's symptom reports. Further, the ALJ's view on Plaintiff's symptom
6 reports likely impacted the ALJ's analysis throughout his decision, including his
7 assessment of the medical opinions and other evidence of record. As such, the
8 Court need not address Plaintiff's other allegations of error.

9 Even so, the Court notes that throughout the ALJ's mental-impairment
10 analysis—including his assessment of the medical-opinion evidence and the
11 Listings' Paragraph B criteria—the ALJ cited to the same treatment notes and
12 applied the same erroneous reasoning that he used to discount Plaintiff's symptom
13 reports.⁹⁸ In evaluating the persuasiveness of the medical opinions, the ALJ failed
14 to adequately articulate how the opinions being rejected were rendered less
15 persuasive by the evidence being relied upon.⁹⁹

17 ⁹⁷ See AR 136 (opining that employers would generally tolerate no more than one
18 absence per month on average).

19 ⁹⁸ See AR 22–23, 25, 27–28.

20 ⁹⁹ See 20 C.F.R. §§ 404.1520c, 416.920c (setting forth relevant factors and
21 articulation requirements for the ALJ to follow when analyzing medical opinions);

22 *Embrey*, 849 F.2d at 421–22 (requiring the ALJ to identify and explain
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1 **C. Remand: Further proceedings are required.**

2 Plaintiff seeks a remand for payment of benefits. However, further
3 proceedings are necessary because significant questions of fact remain, and
4 disability is not clearly established.¹⁰⁰ On remand, the ALJ shall conduct the
5 disability evaluation anew, beginning at step two, subject to the following
6 instructions.

- 7
- The ALJ shall expressly address Plaintiff's hernia and what effect, if any,
8 it has on Plaintiff's RFC.
 - If the ALJ again discounts Plaintiff's symptom reports, the ALJ must
9 articulate specific, clear, and convincing reasons for doing so.¹⁰¹ General
10 findings are insufficient because the Court cannot affirm discounting
11 Plaintiff's symptoms for a reason not articulated by the ALJ.¹⁰² The ALJ
12 must identify what symptoms are being discounted and what evidence
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17 inconsistencies before discounting a medical opinion based on the consistency
18 factor).

19 ¹⁰⁰ See *Leon v. Berryhill*, 800 F.3d 1041, 1045 (9th Cir. 2017); *Garrison*, 759 F.3d at
20 1020.

21 ¹⁰¹ *Ghanim*, 763 F.3d at 1163.

22 ¹⁰² See *Garrison*, 759 F.3d at 1010.

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1 undermines these symptoms.¹⁰³ In doing so, the ALJ should be mindful
2 not to conflate inconsistency with the mere absence of support—a
3 claimant’s symptom reports cannot be discounted solely on the grounds
4 that they are not fully corroborated by objective medical evidence.¹⁰⁴

- 5 • Further, if the ALJ again relies upon conservative treatment as a reason
6 to discount Plaintiff’s symptom testimony (or any other evidence), the
7 ALJ must expressly consider what treatment options are available and
8 whether the evidence supports any alternative explanations—reasons
9 other than Plaintiff’s symptoms being less severe than he claims—for
10 why Plaintiff has not pursued treatment of a different type or degree of
11 available treatment.
- 12 • As to the medical-opinion evidence, the ALJ must meaningfully articulate
13 the supportability and consistency of each medical source, specifically
14 including Dr. Marks.
- 15 • As to Plaintiff’s scoliosis/back pain and hernia—especially if the ALJ
16 again rejects all the current medical opinions regarding Plaintiff’s
17 physical impairments and resulting limitations—the ALJ is encouraged
18 to call a medical expert who is qualified to assess the significance of the
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20 ¹⁰³ *Ghanim*, 763 F.3d at 1163 (requiring the ALJ to sufficiently explain why he
21 discounted claimant’s symptom claims).

22 ¹⁰⁴ *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
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1 medical evidence, specifically including the physical-exam results and the
2 medical imaging in the record, in the context of scoliosis/back pain and/or
3 a hernia.

- 4 • As to Plaintiff's mental impairments, the ALJ is also encouraged to call a
5 mental-health expert qualified to assess the significance of the medical
6 evidence, specifically including the normal mental-status findings, as
7 well as the extent to which Plaintiff's mental-impairment symptoms may
8 reasonably be expected to wax and wane, even with treatment.
- 9 • Generally, unless made clear by context, the ALJ should explain whether
10 a finding applies to the entire relevant period or just a portion thereof.¹⁰⁵

11 V. Conclusion

12 Plaintiff establishes the ALJ erred. The ALJ is to develop the record and
13 reevaluate—with meaningful articulation and evidentiary support—the sequential
14 process as set forth above.

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is
17 **GRANTED.**
- 18 2. The Commissioner's Motion for Summary Judgment, **ECF No. 12**, is
19 **DENIED.**
- 20 3. The Clerk's Office shall enter **JUDGMENT** in favor of **Plaintiff**.

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22 ¹⁰⁵ See *Smith*, 14 F.4th at 1113.

