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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Luis A. Moreno,
Plaintiff,
vs.
Carolyn W. Colvin, Acting Commissioner
of Social Security,
Defendant.

No. CV-12-1567-PHX-FJM

ORDER

The court has before it plaintiff’s opening brief (doc. 11), defendant’s response (doc. 14), and plaintiff’s reply (doc. 15).

I.

This case arises from a denial by the Social Security Administration of plaintiff’s application for supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff alleged a disability beginning February 29, 2008, due to physical and mental impairments, including major depression with psychotic features. The claim was denied initially and upon reconsideration. After a hearing on November 1, 2010, the administrative law judge (ALJ) issued a decision denying benefits. The decision became the final decision of the Commissioner when the Appeals Council denied plaintiff’s request for review. Plaintiff then filed this action for judicial review under 42 U.S.C. §§ 405(g), 1383(c)(3).

A district court may set aside a denial of benefits “only if it is not supported by substantial evidence or if it is based on legal error.” Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is “relevant evidence which, considering the record as

1 a whole, a reasonable person might accept as adequate to support a conclusion. Where the
2 evidence is susceptible to more than one rational interpretation, one of which supports the
3 ALJ's decision, the ALJ's conclusion must be upheld." Id. (citation omitted).

4 The ALJ determined that plaintiff's diabetes, obesity, and depression were "severe"
5 impairments as defined by the Social Security Act. He also found that plaintiff's intellectual
6 functioning was in the borderline range, but that his cognitive impairment was not "severe"
7 within the meaning of the Act. The ALJ concluded that plaintiff has the residual functional
8 capacity to perform medium work, except that his mental impairments limit him to unskilled
9 work. Tr. 31. The ALJ further found that plaintiff is able to perform his past relevant work
10 as a field worker, restaurant worker, and a landscape worker. Therefore, the ALJ concluded
11 that plaintiff is not disabled within the meaning of the Act.

12 II.

13 At step two of the five-step sequential analysis, the ALJ found that plaintiff's diabetes,
14 obesity and depression were "severe" within the meaning of 20 C.F.R. § 416.920(c).
15 Plaintiff argues that the ALJ erred in failing to also find that his cognitive impairment was
16 "severe."

17 An impairment is "severe" if it "significantly limits" an individual's mental or
18 physical ability to perform basic work activities. Id. Notwithstanding that the ALJ did not
19 include borderline intellectual functioning in the list of plaintiff's "severe" impairments, he
20 did consider the impairment throughout the sequential analysis and included the effect of the
21 borderline intellectual functioning in determining the plaintiff's residual functional capacity.
22 The ALJ acknowledged IQ testing by Dr. Bencomo that revealed a nonverbal IQ of 75. He
23 also considered plaintiff's lapses in concentration and memory during Dr. Bencomo's
24 examination, and plaintiff's reports of memory difficulties to treating and examining sources.
25 Tr. 31, 415, 424-25, 465. Based on the record evidence, the ALJ found that plaintiff had
26 moderate difficulty in concentration, persistence, and pace. Tr. 31. The ALJ concluded that
27 plaintiff's mental impairments limit him to unskilled work. Tr. 31.

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1 reasons for rejecting a treating or examining physician’s opinion, it may “constitute
2 substantial evidence when it is consistent with other independent evidence in the record.”
3 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001); SSR 96-6p.

4 Dr. Gallucci completed forms indicating that plaintiff had marked limitations in his
5 ability to understand, remember, and carry out detailed instructions, and no more than
6 moderate limitations in the remaining functional abilities. Tr. 427-28. Dr. Gallucci opined
7 that plaintiff could perform simple work, work in coordination with or proximity to others
8 without being unduly distracted, respond appropriately to criticism from supervisors, and
9 respond appropriately to changes in a routine work setting. Tr. 429. Dr. Gallucci therefore
10 concluded that plaintiff had all of the abilities required to meet the mental demands of
11 unskilled work. Tr. 429.

12 Dr. Gallucci’s opinion is consistent with other evidence in the record including
13 treating sources who consistently noted that plaintiff was always polite, respectful and
14 cooperative in their interactions. Tr. 648, 650, 676. Moreover, even Dr. Bencomo found that
15 plaintiff has adequate social interaction skills and can interact appropriately with the general
16 public. Tr. 36, 425. Like other medical sources, Dr. Bencomo reported that plaintiff’s
17 behavior during interactions was socially appropriate. Tr. 425.

18 Finally, Dr. Bencomo’s opinion was based in large part on plaintiff’s subjective
19 complaints of disabling limitations. Therefore the reliability of that opinion is inextricably
20 intertwined with plaintiff’s credibility. The ALJ’s conclusion that plaintiff is not fully
21 credible, Tr. 34, also calls into question the reliability of Dr. Bencomo’s assessments. See
22 Tonapetyan, 242 F.3d at 1149 (“Because the present record supports the ALJ in discounting
23 [claimant’s] credibility, . . . he was free to disregard [an examining physician’s] opinion,
24 which was premised on [claimant’s] subjective complaints.”).

25 These reasons are sufficiently specific and legitimate to support the ALJ’s decision
26 to discount portions of Dr. Bencomo’s opinion.

1 **B.**

2 The ALJ also rejected the opinion of psychiatric physician’s assistant Harmston who
3 found that plaintiff had several “moderately severe” and one “severe” mental functional
4 limitations. Tr. 706-07. First, the ALJ rejected Harmston’s opinion that plaintiff has a severe
5 restriction in his ability to respond appropriately to others because it is inconsistent with
6 treating sources who reported that plaintiff is always polite, respectful, and cooperative. Tr.
7 35. Moreover, these conclusions were inconsistent with Mr. Harmston’s own treatment
8 records which demonstrated that plaintiff’s condition improved with treatment. Tr. 675.

9 We conclude that the ALJ gave sufficiently specific and legitimate reasons for
10 discounting the opinions of physician’s assistant Harmston.

11 **IV.**

12 Plaintiff also contends that the ALJ erred in discounting his subjective complaints of
13 disabling symptoms. When evaluating the credibility of subjective complaints, the ALJ must
14 first consider whether there is an underlying medical impairment that could reasonably be
15 expected to produce the claimant’s pain or other symptoms. If an underlying impairment is
16 shown, and there is no evidence of malingering, the ALJ can only reject the claimant’s
17 testimony about the severity of the symptoms by giving “specific, clear and convincing
18 reasons for the rejection.” Chaudhry v. Astrue, 688 F.3d 661, 670-71 (9th Cir. 2012).

19 The ALJ found that plaintiff’s medically determinable impairments could reasonably
20 be expected to cause only some of plaintiff’s alleged symptoms. The ALJ supported this
21 conclusion by noting that both treating sources, and the plaintiff himself, reported that his
22 medications were working and that he was feeling better. Tr. 33. An impairment that can
23 reasonably be alleviated by treatment cannot serve as a basis for a finding of disability.
24 Warre v. Comm’r of Soc. Sec., 439 F.3d 1001, 1006 (9th Cir. 2006).

25 The ALJ observed that plaintiff had a long history of mental health treatment with
26 counseling and medication that were “generally successful” in controlling his symptoms of
27 depression and anxiety. Tr. 35. In June 2008, plaintiff reported that he was doing better and
28 his mental status exam revealed euthymic (normal) mood and appropriate affect. Tr. 457.

1 In July 2008, plaintiff's counselor reported that he was doing well and could be discharged
2 from counseling. Tr. 639. In February 2010, plaintiff stated he was "getting along," and his
3 medications worked well without side effects. Tr. 675. Plaintiff's treating physician's
4 assistant, Mr. Harmston, reported that plaintiff's mood was euthymic and his affect
5 appropriate. Tr. 676. Plaintiff reported in May 2010 that his medications were working and
6 that he was feeling better. Tr. 33. In September 2010, treating sources noted that plaintiff's
7 medications were working well and that plaintiff exhibited normal behavior, an appropriate
8 affect, relaxed mood and good concentration. Tr. 33. The ALJ's finding that plaintiff's
9 treatment has been generally successful in controlling his symptoms is supported by
10 significant evidence in the record.

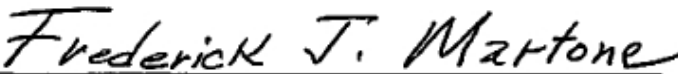
11 The ALJ also found that plaintiff's daily activities were not fully consistent with his
12 complaints of disabling limitations. Plaintiff is able to spend time with his father and
13 extended family, take frequent walks, help with housecleaning, and actively look for work.
14 The ALJ reasonably found that the job search indicates that plaintiff's own perceptions of
15 his ability to work are at odds with the limitations he otherwise reported.

16 All of these reasons are sufficiently clear and convincing to support the ALJ's
17 conclusion that plaintiff's subjective complaints are not fully credible.

18 **V.**

19 Based on the foregoing, we conclude that the ALJ's decision that plaintiff is not
20 disabled is supported by substantial evidence in the record. Therefore, **IT IS ORDERED**
21 **AFFIRMING** the decision of the Commissioner denying disability benefits.

22 DATED this 26th day of September, 2013.

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25 Frederick J. Martone
26 Senior United States District Judge
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