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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Randy Russell Frantz, Plaintiff, v. Commissioner of Social Security Administration, Defendant.	No. CV-16-04048-PHX-GMS **ORDER**

Pending before the Court is the appeal of Plaintiff Randy Russell Frantz, which challenges the Social Security Administration's decision to deny supplemental security income. (Doc. 1.) For the reasons set forth below, this Court affirms the determination of the Commissioner.

BACKGROUND

On June 26, 2013, Mr. Frantz protectively filed an application for supplemental security income, alleging a disability onset date of July 1, 2013.[1] (Tr. 22.) His claim was initially denied on December 2, 2013 and it was denied again upon reconsideration on March 21, 2014. (*Id.*) Mr. Frantz then filed a written request for a hearing and he testified before Administrative Law Judge ("ALJ") Sheldon P. Zisook. (*Id.*) On August 31, 2015, the ALJ issued a decision finding Mr. Frantz not disabled. (Tr. 30.)

[1] This date was amended from January 1, 2013 in a letter from Mr. Frantz's attorney. (Tr. 22.)

In evaluating whether Mr. Frantz was disabled, the ALJ undertook the five-step sequential evaluation for determining disability.[2] (Tr. 23–24.) At step one, the ALJ found that Mr. Frantz had not engaged in substantial gainful activity since July 1, 2013, the alleged onset date.[3] (Tr. 25.) At step two, the ALJ determined that Mr. Frantz suffered from two medically determinable impairments: schizoaffective disorder and attention deficit hyperactive disorder ("ADHD"). However, he determined that these impairments were not severe, as they did not significantly limit Mr. Frantz's "ability to perform basic work-related activities for 12 consecutive months; therefore, the claimant does not have a severe impairment or combination of impairments." (Tr. 24.) Having found Mr. Frantz not disabled at step two, the ALJ did not continue his analysis through the remainder of the five-step process.

The Appeals Council declined to review the decision. (Tr. 1–3.) Mr. Frantz filed the complaint underlying this action on November 22, 2016 seeking this Court's review of the ALJ's denial of benefits. (Doc. 1.) The matter is now fully briefed. (Docs. 10, 11, 12.)

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[2] The five-step sequential evaluation of disability is set out in 20 C.F.R. § 404.1520 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing supplemental security income). Under the test:

> A claimant must be found disabled if she proves: (1) that she is not presently engaged in a substantial gainful activity[,] (2) that her disability is severe, and (3) that her impairment meets or equals one of the specific impairments described in the regulations. If the impairment does not meet or equal one of the specific impairments described in the regulations, the claimant can still establish a prima facie case of disability by proving at step four that in addition to the first two requirements, she is not able to perform any work that she has done in the past. Once the claimant establishes a prima facie case, the burden of proof shifts to the agency at step five to demonstrate that the claimant can perform a significant number of other jobs in the national economy. This step-five determination is made on the basis of four factors: the claimant's residual functional capacity, age, work experience and education.

Hoopai v. Astrue, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal quotation marks and citations omitted).

[3] The record indicates that Mr. Frantz earned $359.73 in 2013, and that this did not rise to the level of substantial gainful activity. (Tr. 24.) Neither party contests this.

DISCUSSION

I. Legal Standard

A reviewing federal court need only address the issues raised by the claimant in the appeal from the ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). A federal court may set aside a denial of disability benefits only if that denial is either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is "more than a scintilla but less than a preponderance." *Id.* (quotation omitted). "Substantial evidence is relevant evidence which, considering the record as a whole, a reasonable person might accept as adequate to support a conclusion." *Id.* (quotation omitted).

The ALJ is responsible for resolving conflicts in testimony, determining credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). "When the evidence before the ALJ is subject to more than one rational interpretation, we must defer to the ALJ's conclusion." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). This is so because "[t]he [ALJ] and not the reviewing court must resolve conflicts in evidence, and if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ." *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citations omitted). However, the Court "must consider the entire record as a whole and may not affirm simply by isolating a 'specific quantum of supporting evidence.'" *Id.* (citing *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)). Nor may the Court "affirm the ALJ's . . . decision based on evidence that the ALJ did not discuss." *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

II. Analysis

A. The ALJ Did Not Err in Denying Mr. Frantz's Request for Benefits at Step Two.

The Ninth Circuit does not defer to the Secretary's application of the severity regulations at step two, but imposes a more narrow construction upon them. *Yuckert v. Bowen,* 841 F.2d 303, 306 (9th Cir. 1988) ("Despite the deference usually accorded to the

Secretary's application of regulations, numerous appellate courts have imposed a narrow construction upon the severity regulation applied here."). In this circuit, "the step-two inquiry is a de minimis screening device to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). Thus "[a]n ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when his conclusion is 'clearly established by medical evidence.'" *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2009) (quoting S.S.R. 85–28). Therefore, in this circuit at least, the correct application of the substantial evidence requirement requires the ALJ to demonstrate how the medical evidence "clearly establishes" that the claimant had at most only "a slight abnormality that has no more than a minimal effect on an individual's ability to work." *Webb*, 433 F.3d at 687.

1. The Medical Evidence Supported a Finding Mr. Frantz's Impairments Non-Severe.

In determining whether medical evidence "clearly establishes" that the claimant had no more than a slight abnormality, an ALJ may nevertheless weigh medical opinions at step two of the five step analysis. *See generally Edlund v. Massanari*, 253 F.3d 1152, 1158–59 (9th Cir. 2001), *as amended on reh'g* (Aug. 9, 2001) (analyzing whether an ALJ provided the "clear and convincing reasons required to reject an uncontradicted opinion of an examining psychologist" at step two of the five step inquiry); *Webb*, 433 F.3d at 687 (considering "whether the ALJ had substantial evidence to find that the medical evidence clearly established that [the claimant] did not have a medically severe impairment or combination of impairments."). Generally, treating physicians are entitled to greater weight than examining physicians, who are in turn entitled to greater weight than non-examining physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *as amended* (Apr. 9, 1996). However, if a treating or examining physician's opinion is contradicted, then his opinion may be "rejected for specific and legitimate reasons that are supported by substantial evidence in the record." *Id.* at 830–31. Because Dr. Horowitz's opinion was contradicted by the consulting psychiatrist, Dr. Hauke, as well as

the state agency physicians, Drs. Kahn and Tomak, the ALJ was required to provide specific and legitimate reasons for discrediting Dr. Horowitz's opinions that amount to clearly establishing that Mr. Frantz's disability was not severe

The ALJ did this by citing to specific instances where Dr. Horowitz's opinion was internally inconsistent with the objective medical evidence of the record as well as his own treatment notes. For example, the ALJ cited to a mental status examination from September 2013 where Dr. Horowitz determined that Mr. Frantz's hygiene was good, his affect appropriate, and his associations logical. (Tr. 720−21.) The entirety of the mental status exam was unremarkable, and Dr. Horowitz noted that Mr. Frantz "had no social barriers," although he did not enjoy engaging socially. (*Id.*) Dr. Horowitz also noted that Mr. Frantz's concentration and memory were "good" at this time. (*Id.*) This instance does not appear to be an outlier; rather, Dr. Horowitz's subsequent mental status exams continued to note that Mr. Frantz encountered "minimal paranoia" but that his associations remained "logical" and his affect "appropriate" throughout October. (Tr. 729.) By January of 2014, Dr. Horowitz's treatment notes indicated that Mr. Frantz was only encountering "mild" symptoms and that he "remains generally stable." (Tr. 735.) Dr. Horowitz noted at that time that one of Mr. Frantz's "objectives" was to "apply for social security benefits, and receive income because [Mr. Frantz] do[es] not want to work, or go to school." (Tr. 734.) In September of 2014, Dr. Horowitz was continuing to note that Mr. Frantz encountered only mild paranoia, and that his mood "has been generally good." The treatment records do not reflect the severity of the limitations that Dr. Horowitz reported in his assessment, and the ALJ did not err in considering this inconsistency while discounting Dr. Horowitz's opinion. (*See* Tr. 27, 720–21, 729, 735, 752, 755, 757, 761, 766, 839–841.)

The ALJ may also discredit a treating physician's opinion where it is contradicted by the other medical providers in the record, although such discrepancies are insufficient, standing alone, to discredit a treating physician's medical opinion.

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ALJs generally utilize a special process to determine if a claimant's alleged mental impairment is severe, and it is not atypical for physicians to utilize the same framework in their opinions when opining on the severity of limitations. *See* 20 C.F.R. § 416.920a(a). During this process, the ALJ identifies and examines the claimant's abilities in four broad functional areas, including: "activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation." 20 C.F.R. § 416.920a(c)(3).[4] If an ALJ rates the degrees of the first three functional areas as "none," or "mild," and there are no episodes of decompensation, the ALJ will "generally conclude that [the claimant's] impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in [his] ability to do basic work activities." 20 C.F.R. § 416.920a(d)(1). Dr. Horowitz indicated that Mr. Frantz "generally does okay" with his activities of daily living, the first broad functional area, and did not indicate that any episodes of decompensation were a factor in his analysis. (Tr. 839–841.) However, Dr. Horowitz's assessment also opined that Mr. Frantz was "moderately" to "severely limited" in the functional areas of sustained concentration and persistence and social functioning. (*Id.*) As noted above, he came to this conclusion despite his own treatment notes, which continuously noted good concentration, and indicated that Mr. Frantz did not have barriers to social functioning beyond his lack of interest in engaging with others, attending school, or obtaining employment. (Tr. 27, 720–21, 729, 734–735, 752, 755, 757, 761, 766.) Dr. Horowitz ultimately determined that Mr. Frantz was disabled due to the presence of moderate to severe limitations in two out of the four broad functional areas included in 20 C.F.R. § 416.920a(c)(3).

The other physicians disagreed. Dr. Hauke examined Mr. Frantz on one occasion, and determined that he did not have any impairment in the first three functional areas.

[4] These were the factors that the ALJ should have considered at the time of Mr. Frantz's hearing, in August of 2015. The factors have since been updated, and now instruct an ALJ to consider a claimant's ability to "[u]nderstand, remember, or apply information; interact with others; concentrate, persist, or maintain pace; and adapt or manage oneself." 20 C.F.R. § 416.920a(c)(3).

(Tr. 716.) She likewise found no episodes of decompensation. (*Id.*) Thus, despite the fact that she acknowledged that Mr. Frantz did have mental impairments, she ultimately opined that they were non-severe. (Tr. 715−716.); *see also* 20 C.F.R. § 416.920a(d)(1) ("If we rate the degree of your limitation in the first three functional areas as "none" or "mild" and "none" in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities.") State agency physicians Drs. Kahn and Tomak supported her findings. (Tr. 76, 88.)

The inconsistencies between the objective medical evidence and Dr. Horowitz's treating records and his ultimate opinion as well as the contradictions between his opinion and the findings of the other physicians "provide[s] substantial evidence to find that the medical evidence clearly established [the claimant's] lack of a medically severe impairment or combination of impairments." *Webb*, 433 F.3d at 688. Therefore, the ALJ did not err in weighing the medical evidence of the record at step two to ultimately find Mr. Frantz's impairments to be non-severe.

2. The ALJ Committed Non-Prejudicial Error by Considering the Other Evidence of the Record.

Pursuant to Ninth Circuit case law, the relevant inquiry at step two of the five step analysis is whether the *medical* evidence of the record clearly establishes that the claimant does not have a severe impairment. *Webb*, 433 F.3d at 683. Therefore, to the extent that the ALJ considered the third party statements of Mr. Frantz's father and the credibility of the claimant's symptom testimony at step two, it was not necessary to do so and constituted error to the extent that he relied on these assessments to determine that the impairment was not severe. (Tr. 26.)

When faced with conflicting medical testimony, an ALJ may properly consider whether a physician inappropriately relied upon the claimant's subjective descriptions of his symptoms. *See generally Webb*, 433 F.3d at 688 ("Credibility determinations do bear on evaluations of medical evidence when an ALJ is presented with conflicting medical

opinions or inconsistency between a claimant's subjective complaints and his diagnosed conditions."). In such an instance, the credibility of the claimant necessarily comes into the analysis. However, that was not the case here. The ALJ discounted Dr. Horowitz's medical evidence in favor of the other physicians for two reasons: first, that Dr. Horowitz's disability assessment was internally inconsistent with his own treatment records and second, it was inconsistent with the objective medical findings of the record. Neither of these rationales presents an instance where the claimant's credibility implicates the medical evidence in the record, which is the only evidence that is implicated at step two. *See id.* ("But there is no inconsistency [in this case] between Webb's complaints and his doctors' diagnoses sufficient to doom his claim as groundless under the de minimis standard of step two."). Thus, in this instance, considering Mr. Frantz's credibility at step two was an error.

Once it has been determined that an ALJ made an error during the review of a claimant's file, the next step is to determine whether the error was prejudicial. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (applying the harmless error standard after determining that two of the ALJ's reasons supporting his adverse credibility finding were invalid). Ninth Circuit precedents "do not quantify the degree of certainty needed to conclude that an ALJ's error was harmless." *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015). The general rule is that an error is harmless where a court is can conclude that "the ALJ's decision remains legally valid, despite such error." *Carmickle*, 533 F.3d at 1162; *see also Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (finding error harmless where a court can "conclude from the record that the ALJ would have reached the same result absent the error."). Therefore, if the ALJ's reasoning and determination are "adequately supported by substantial evidence in the record" despite his error, his error is harmless. *Carmickle*, 533 F.3d at 1162.

In this case, the ALJ improperly considered the non-medical evidence of the record in addition to the medical evidence of the record to ultimately conclude that Mr. Frantz's claims were non-severe. However, as outlined above, the ALJ's reliance on the

medical evidence alone provided "substantial evidence to find that the medical evidence clearly established [the claimant's] lack of a medically severe impairment or combination of impairments." *Webb*, 433 F.3d at 688. Therefore, the ALJs conclusion that Mr. Frantz's impairments were non-severe at step two remains legally valid despite his improper consideration of the other evidence. Thus, the ALJ's error was not prejudicial, and his findings are affirmed.

IT IS THEREFORE ORDERED that the ALJ's decision is **AFFIRMED.** The Clerk of Court is directed to enter judgment accordingly.

Dated this 27th day of July, 2017.

G. Murray Snow

Honorable G. Murray Snow
United States District Judge