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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD S.,¹
Plaintiff

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:21-cv-07452-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Richard S. (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits (“DIB”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 10 and 11] and briefs [Dkts. 22 (“Pl. Br.”), 25 (“Def. Br.”), & 26 (“Reply”)] addressing disputed issues in the case. The matter is now ready for decision. For the reasons set forth below, the Court finds that this matter should be remanded.

¹ In the interest of privacy, this Order uses only the first name and the initial of the last name of the non-governmental party in this case.

1 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

2 Plaintiff filed an application for DIB on November 13, 2018, alleging
3 disability beginning August 18, 2015. [Dkt. 15, Administrative Record (“AR”) 17,
4 164-70.] Plaintiff’s application was denied at the initial level of review and on
5 reconsideration. [AR 17, 70, 86.] A telephone hearing was held before
6 Administrative Law Judge John Dowling (“the ALJ”) on February 18, 2021. [AR
7 17, 31-54.]

8 On March 5, 2021, the ALJ issued an unfavorable decision applying the five-
9 step sequential evaluation process for assessing disability. [AR 17-26]; *see* 20
10 C.F.R. § 404.1520(b)-(g)(1). At step one, the ALJ determined that Plaintiff had not
11 engaged in substantial gainful activity during the relevant period, the alleged onset
12 date of August 18, 2015, through the date last insured of March 31, 2020. [AR 19.]
13 At step two, the ALJ determined that Plaintiff has the following severe impairments:
14 degenerative disc disease and degenerative joint disease. [AR 19.] At step three,
15 the ALJ determined that Plaintiff does not have an impairment or combination of
16 impairments that meets or medically equals the severity of one of the impairments
17 listed in Appendix I of the Regulations. [AR 22]; *see* 20 C.F.R. Pt. 404, Subpt. P,
18 App. 1. The ALJ found that Plaintiff has the residual functional capacity (“RFC”) to
19 perform light work, as defined in 20 C.F.R. § 404.1567(b), except that Plaintiff is
20 limited to occasional climbing of ramps and stairs, stooping, kneeling, crouching,
21 and crawling, should never climb ladders, ropes or scaffolds, and should avoid
22 concentrated exposure to extreme cold and excessive vibration. [AR 22.] At step
23 four, the ALJ determined that Plaintiff is capable of performing his past relevant
24 work as a sales representative, printing through the date last insured. [AR 26.]
25 Based on these findings, the ALJ concluded that Plaintiff was not disabled at any
26 time from August 18, 2015, through March 31, 2020. [AR 26.]

27 The Appeals Council denied review of the ALJ’s decision on August 3, 2021.
28 [AR 1-6.] This action followed.

1 Plaintiff raises the following issues challenging the ALJ’s findings and
2 determination of non-disability:

3 1. The ALJ failed to properly consider the severity of Plaintiff’s
4 medically determinable mental impairments and the medical opinion
5 evidence. [Pl. Br. at 7-13.]

6 2. The ALJ failed to properly include a sit/stand option in Plaintiff’s
7 RFC. [Pl. Br. at 14-17.]

8 The Commissioner asserts that the ALJ’s decision should be affirmed. [Def.
9 Br. at 1-15.]

11 III. GOVERNING STANDARD

12 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
13 determine if: (1) the Commissioner’s findings are supported by substantial
14 evidence; and (2) the Commissioner used correct legal standards. *See Carmickle v.*
15 *Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm’r*
16 *Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). “Substantial evidence ... is
17 ‘more than a mere scintilla’ ... [i]t means – and only means – ‘such relevant
18 evidence as a reasonable mind might accept as adequate to support a conclusion.’”
19 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations omitted); *Gutierrez v.*
20 *Comm’r of Soc. Sec.*, 740 F.3d 519, 522 (9th Cir. 2014) (“[s]ubstantial evidence is
21 more than a mere scintilla but less than a preponderance”) (internal quotation marks
22 and citation omitted).

23 The Court will uphold the Commissioner’s decision when “‘the evidence is
24 susceptible to more than one rational interpretation.’” *Burch v. Barnhart*, 400 F.3d
25 676, 681 (9th Cir. 2005) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
26 1989)). However, the Court may review only the reasons stated by the ALJ in the
27 decision “and may not affirm the ALJ on a ground upon which he did not rely.”
28 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not reverse the

1 Commissioner’s decision if it is based on harmless error, which exists if the error is
2 “inconsequential to the ultimate nondisability determination, or that, despite the
3 error, the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*,
4 806 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations omitted).

5 6 IV. DISCUSSION

7 Plaintiff contends the ALJ erroneously found his mental impairments not
8 severe at step two of the sequential evaluation process and improperly rejected the
9 opinion of his psychiatrist, Dr. Markus Horvath. [Pl. Br. at 7-13.] As discussed
10 below, the Court agrees with Plaintiff.

11 In February 2020, at the request of Plaintiff, Dr. Horvath wrote a letter to
12 document Plaintiff’s psychiatric impairments. [AR 1111.] Dr. Horvath stated that
13 he began treating Plaintiff in February 2014, Plaintiff had been diagnosed with panic
14 disorder, generalized anxiety disorder and major depressive disorder, recurrent
15 episode, moderate, and Plaintiff’s psychiatric medications included nortriptyline
16 (Aventyl/Pamelor), clonazepam (Klonopin), lamotrigine (Lamictal), and venlafaxine
17 (Effexor XR). [*Id.*] Dr. Horvath opined that Plaintiff has “psychiatric symptoms
18 that interfere [and] cause problems with concentration and memory,” Plaintiff has
19 “difficulty with panic attacks,” and “[d]ue to anxiety and depression, it is hard for
20 [Plaintiff] to maintain attendance at a work site.” [*Id.*]

21 The evaluation at step two is a de minimis test intended to weed out the most
22 minor of impairments. *See Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987);
23 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (stating that the step two
24 inquiry is a “de minimis screening device to dispose of groundless claims”). An
25 impairment is “not severe” if the evidence establishes merely a “slight abnormality
26 that has no more than a minimal effect on an [individual’s] ability to work.”
27 *Smolen*, 80 F.3d at 1290 (internal quotation marks and citations omitted).

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1 An ALJ’s decision to discredit any medical opinion must be supported by
2 substantial evidence. *See Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). The
3 two most important factors for determining the persuasiveness of medical opinions
4 are “supportability” and “consistency.” *Id.* at 791; 20 C.F.R. § 404.1520c(b)(2),
5 (c)(1)-(2).² “Supportability means the extent to which a medical source supports the
6 medical opinion by explaining the ‘relevant ... objective medical evidence.’”
7 *Woods*, 32 F.4th at 791-92 (quoting 20 C.F.R. § 404.1520c(c)(1)). “Consistency
8 means the extent to which a medical opinion is ‘consistent ... with the evidence from
9 other medical sources and nonmedical sources in the claim.’” *Woods*, 32 F.4th at
10 792 (quoting 20 C.F.R. § 404.1520c(c)(2)).

11 Here, in determining that Plaintiff’s mental impairments were not severe, the
12 ALJ rejected Dr. Horvath’s opinion because it was inconsistent with his own notes,
13 contradicted by the objective evidence in the record (namely, Plaintiff’s mental
14 status examinations and activities), and “a regurgitation of [Plaintiff’s] own
15 unsubstantiated complaints.” [AR 21-22.] The ALJ’s stated reasons for rejecting
16 Dr. Horvath’s opinion are not supported by substantial evidence in the record.

17 First, the ALJ found that Dr. Horvath’s opinion that Plaintiff had difficulty
18 with memory was inconsistent with “the doctor’s own notes,” as Plaintiff’s “mini-
19 mental status examination” showed “no evidence of cognitive impairment, an ability
20 to recall recent events, and coherent and logical mood.” [AR 21.] The ALJ appears
21 to be referring to Plaintiff’s Folstein Mini Mental Status Exam, which Dr. Horvath
22 administered in March 2020. [AR 20-21, 1165.] However, Dr. Horvath’s opinion,
23 as expressed in his February 2020 letter, was not based on the results of a single
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26 ² For claims filed on or after March 27, 2017, the ALJ will not “defer
27 [to] or give any specific evidentiary weight, including controlling weight, to any
28 medical opinion(s),” including those from a treating medical source. 20 C.F.R. §
404.1520c(a).

1 exam. Dr. Horvath treated Plaintiff for six years and his notes reflect clinical
2 findings and observations that were consistent with his opinion. [AR 355 (cautioned
3 Plaintiff about sedative effects of Xanax), 387 (noting Plaintiff’s use of medical
4 marijuana and medication can cause memory and cognitive problems), 402 (noting
5 that therapist reported Plaintiff seemed sedated at times), 1133 (warned about
6 gabapentin’s side effects including sedation)]; *see also Woods*, 32 F.4th at 790 (“the
7 extent of the claimant’s relationship with the medical provider ... remains relevant
8 under the new regulations”). Plaintiff reported problems with panic attacks,
9 depressed mood, anxiety, and sleep difficulties and was taking multiple psychiatric
10 medications. [AR 311, 314, 316, 343, 350, 355, 363, 372, 415, 605, 1140.] Thus,
11 the ALJ’s selective reliance on Plaintiff’s March 2020 Folstein Mini Mental Status
12 Exam does not provide a sufficient basis for rejecting Dr. Horvath’s opinion. *See*
13 *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (explaining that a
14 medical source’s “statements must be read in context of the overall diagnostic
15 picture he draws”).

16 As to the ALJ’s second reason, although consistency with the record is an
17 important factor in evaluating the persuasiveness of a medical opinion, Plaintiff’s
18 mental status examinations do not necessarily undermine Dr. Horvath’s opinion that
19 Plaintiff’s anxiety and depression affect his ability to maintain attendance at work.
20 [AR 21.] As the ALJ noted, Plaintiff displayed abnormal mood and affect. [AR
21 21.] Dr. Horvath often described Plaintiff’s mood as “anxious” or “depressed” and
22 his affect as “restricted.” [AR 312, 355, 373, 380, 387, 399, 416 604, 1197, 1316.]
23 Dr. Horvath also reported that additional symptoms were associated with Plaintiff’s
24 history of anxiety, depression and panic attacks. [AR 312, 316, 355, 373, 380, 387,
25 399, 416, 604, 1197, 1316.] Thus, it does not appear that Plaintiff’s unremarkable
26 results in the several other areas of the mental status exam (i.e., appearance, speech,
27 thoughts, cognition, knowledge, and judgment and insight) were inconsistent with
28 Dr. Horvath’s opinion concerning Plaintiff’s ability to maintain attendance at work.

1 See, e.g., *Fife v. Comm’r of Soc. Sec.*, 583 F. Supp. 3d 1344, 1354-56 (W.D. Wash.
2 2022) (finding that mental exams showing intact memory and cognitive functioning
3 did not undermine doctor’s opinion concerning plaintiff’s impairments due to
4 bipolar disorder and other conditions); see also *Wranich v. Kijakazi*, No. 3:22-CV-
5 0119-HRH, 2022 WL 16960900, at *5 (D. Alaska Nov. 16, 2022) (“Mental status
6 exams are only one piece of evidence ALJs are to consider when assessing a
7 claimant’s mental impairments.”).

8 Inconsistency with a claimant’s activities may serve as a proper basis for
9 rejecting a medical source’s opinion. See *Rollins v. Massanari*, 261 F.3d 853, 856
10 (9th Cir. 2001). However, “[o]ccasional symptom-free periods—and even—the
11 sporadic ability to work—are not inconsistent with disability.” *Lester v. Chater*, 81
12 F.3d 821, 833 (9th Cir. 1995), *superseded on other grounds by regulation*,
13 Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg.
14 5844, 5852 (Jan. 18, 2017) (codified at 20 C.F.R. pt. 404), *as recognized in Woods*,
15 32 F.4th at 789-90; see *Holohan*, 246 F.3d at 1205 (explaining that when “a person
16 who suffers from severe panic attacks, anxiety, and depression” improves, that
17 “does not mean that the person’s impairments no longer seriously affect her ability
18 to function in a workplace”). “[D]isability claimants should not be penalized for
19 attempting to lead normal lives in the face of their limitations.” *Reddick v. Chater*,
20 157 F.3d 715, 722 (9th Cir. 1998) (citing *Cooper v. Bowen*, 815 F.2d 557, 561 (9th
21 Cir. 1987) (claimant need not “vegetate in a dark room” in order to be deemed
22 eligible for benefits)). Here, the ALJ cited Plaintiff’s reports of visiting terminally
23 ill friends and relatives, helping to organize a birthday party for 200 people,
24 planning a weekend retreat, doing some household chores, running errands,
25 managing his money, and taking a friend to the doctor. [AR 21.] However, the ALJ
26 did not explain how any of these activities negated Dr. Horvath’s opinion that
27 Plaintiff suffers from panic attacks, anxiety and depression and that his impairments
28 affect his ability to maintain attendance at work. [AR 1111.] Moreover, the record

1 reflects that several of the reported activities appeared to exacerbate Plaintiff's
2 symptoms. [AR 343, 355, 372, 1135.] Thus, the ALJ's conclusion that Dr.
3 Horvath's opinion was inconsistent with the record evidence is not an adequate
4 reason for rejecting his opinion.

5 Finally, the ALJ asserted that Plaintiff improperly coached Dr. Horvath on the
6 information included in his February 2020 opinion letter. [AR 21-22, 1111.] The
7 ALJ noted that "the record includes a statement from [Plaintiff] telling his doctor
8 what his cousin, who 'works for SSDI' said to do ... [and] direct[ing] Dr. Horvath
9 to 'explain that my depression can keep me from consistent attendance at work, and
10 how my anxiety makes it hard to focus on tasks for very long.'" [AR 21-22, 1171.]
11 The ALJ described Dr. Horvath's opinion as "a regurgitation of [Plaintiff's] own
12 unsubstantiated complaints ... consistent with [Plaintiff's] desires." [AR 22, 1111.]
13 The Ninth Circuit has made clear that it "may not [be] assumed that doctors
14 routinely lie in order to help their patients collect disability benefits." *Lester*, 81
15 F.3d at 832. While Plaintiff's statement contains a summary of his subjective
16 symptoms, it does not indicate any impropriety with respect to Dr. Horvath's
17 February 2020 opinion. The ALJ should not have speculated or assumed that Dr.
18 Horvath's opinion was simply a "regurgitation" of Plaintiff's complaints. *See*
19 *Lester*, 81 F.3d at 832; *see also Smolen*, 80 F.3d at 1288 ("If the ALJ thought he
20 needed to know the basis of [the doctors'] opinions in order to evaluate them, he had
21 a duty to conduct an appropriate inquiry, for example, by subpoenaing the
22 physicians or submitting further questions to them."); *Brown v. Heckler*, 713 F.2d
23 441, 443 (9th Cir. 1983) ("the ALJ has a special duty to fully and fairly develop the
24 record and to assure that the claimant's interests are considered").

25 Defendant argues that even if Dr. Horvath's opinion had been persuasive, the
26 ALJ's conclusion that Plaintiff's mental impairments were not severe would have
27 been proper based on the medical evidence and opinions of the reviewing medical
28 consultants. [Def. Br. at 7-8 (citing AR 64, 79-80).] However, by failing to

1 properly consider Dr. Horvath’s opinion, the ALJ failed to address Plaintiff’s mental
2 health impairments throughout the remaining steps of the sequential evaluation
3 process. As such, the ALJ’s decision is not supported by substantial evidence.

4 As the circumstances of this case suggest that further administrative
5 proceedings could remedy the ALJ’s errors, remand is appropriate. *See Dominguez*
6 *v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court concludes
7 that further administrative proceedings would serve no useful purpose, it may not
8 remand with a direction to provide benefits.”); *Treichler v. Comm’r of Soc. Sec.*
9 *Admin.*, 775 F.3d 1090, 1101, n.5 (9th Cir. 2014) (remand for further administrative
10 proceedings is the proper remedy “in all but the rarest cases”); *Harman v. Apfel*, 211
11 F.3d 1172, 1180-81 (9th Cir. 2000) (remand for further proceedings rather than for
12 the immediate payment of benefits is appropriate where there are “sufficient
13 unanswered questions in the record”).

14 Having found that remand is warranted, the Court declines to address
15 Plaintiff’s remaining issues. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir.
16 2012) (“Because we remand the case to the ALJ for the reasons stated, we decline to
17 reach [plaintiff’s] alternative ground for remand.”).

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V. CONCLUSION

For all of the foregoing reasons, **IT IS ORDERED** that:

- (1) the decision of the Commissioner is REVERSED and this matter is REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Memorandum Opinion and Order; and
- (2) Judgment be entered in favor of Plaintiff.

IT IS ORDERED.

DATED: January 11, 2023



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE