

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

BRIAN HARRIS,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security
Administration,

Defendant.

Case No. 2:17-cv-02741-RFB-BNW

ORDER

I. INTRODUCTION

Before the Court is Plaintiff Brian Harris's Motion for Remand, ECF No. 15, and Defendant Nancy A. Berryhill's Cross-Motion to Affirm, ECF No. 18.

For the reasons discussed below, the Court finds that the ALJ's decision is not supported by substantial evidence. The Court grants Plaintiff's Motion for Remand and denies Defendant's Cross-Motion to Affirm.

II. BACKGROUND

On June 23, 2014, Plaintiff completed an application for disability insurance benefits alleging disability since October 31, 2011. AR 25. Plaintiff was denied initially on November 13, 2014 and upon administrative reconsideration on April 13, 2015. AR 25. Plaintiff requested a hearing before an Administrative Law Judge ("ALJ") and appeared on August 18, 2016. AR 25. In an opinion dated August 31, 2016, ALJ Cynthia R. Hoover found Plaintiff not disabled. AR 25-34. The Appeals Council denied Plaintiff's request for review on July 17, 2017, rendering the ALJ's decision final. AR 1-4.

1 The ALJ followed the five-step sequential evaluation process for
2 determining Social Security disability claims set forth at 20 C.F.R. § 404.1520(a)(4). At step one,
3 that ALJ found that Plaintiff has not engaged in substantial gainful activity since June 23, 2014,
4 the application date. AR 27. At step two, the ALJ found that Plaintiff has the following severe
5 impairments: asthma, degenerative disc disease of the cervical and lumbar spine, depressive
6 disorder, anxiety disorder, personality disorder and polysubstance abuse. AR 27. At step three,
7 the ALJ found that Plaintiff’s impairments do not meet or medically equal a listed impairment.
8 AR 27–28.

9 The ALJ found that Plaintiff has the residual functional capacity (“RFC”) to perform
10 medium work, as defined in 20 C.F.R. § 416.967(c), except that he needs to avoid concentrated
11 exposure to extreme cold, humidity and to pulmonary irritants; he is able to perform unskilled
12 work with routine, simple repetitive tasks and occasional contact with others in brief superficial
13 interactions; and he needs to work in a workplace that does not require adjustments to frequent
14 change. AR 28–32. Based on this RFC, the ALJ found at step four that Plaintiff was unable to
15 perform his past relevant work as an electrician. AR 32. At step five, the ALJ found that Plaintiff
16 could perform jobs such as laborer/warehouse worker (D.O.T. #922.687-058), kitchen helper,
17 (D.O.T. #318.687-010), and handpacker (D.O.T. #920.587-018). AR 32–33.

18 19 **III. LEGAL STANDARD**

20 42 U.S.C. § 405(g) provides for judicial review of the Commissioner’s disability
21 determinations and authorizes district courts to enter “a judgment affirming, modifying, or
22 reversing the decision of the Commissioner of Social Security, with or without remanding the
23 cause for a rehearing.” In undertaking that review, an ALJ’s “disability determination should be
24 upheld unless it contains legal error or is not supported by substantial evidence.” Garrison v.
25 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). “Substantial evidence means more
26 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable
27 person might accept as adequate to support a conclusion.” Id. (quoting Lingenfelter v. Astrue, 504
28 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

1 “If the evidence can reasonably support either affirming or reversing a decision, [a
2 reviewing court] may not substitute [its] judgment for that of the Commissioner.” Lingenfelter,
3 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the
4 evidence supporting the ALJ’s conclusion, nor can the Court affirm on a ground on which the ALJ
5 did not rely. Garrison, 759 F.3d at 1009–10. Rather, the Court must “review the administrative
6 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ’s
7 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews
8 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

9 “The ALJ is responsible for determining credibility, resolving conflicts in medical
10 testimony, and for resolving ambiguities.” Id. When determining the credibility of a claimant’s
11 testimony, the ALJ engages in a two-step analysis. Garrison, 759 F.3d at 1014–15. First, the
12 claimant must have presented objective medical evidence of an underlying impairment “which
13 could reasonably be expected to produce the pain or other symptoms alleged.” Lingenfelter, 504
14 F.3d at 1035–36 (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991)). The claimant
15 does not need to produce evidence of the symptoms alleged or their severity, but he must show the
16 impairments could reasonably cause some degree of the symptoms. Smolen v. Chater, 80 F.3d
17 1273, 1282 (9th Cir. 1996). Second, the ALJ determines the credibility of the claimant’s testimony
18 regarding the severity of his symptoms. Garrison, 759 F.3d at 1014–15. Unless affirmative
19 evidence supports a finding of malingering, the ALJ may only reject the claimant’s testimony by
20 providing “specific findings as to credibility and stating clear and convincing reasons for
21 each.” Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006). As of 2016, the Social
22 Security Administration has eliminated the use of the term “credibility” from its policy, as
23 “subjective symptom evaluation is not an examination of an individual’s character.” SSR 16-3p.
24 However, ALJs may continue to consider the consistency of a claimant’s statements compared to
25 other statements by the claimant and to the overall evidence of record. Id.

26 The Social Security Act has established a five-step sequential evaluation procedure for
27 determining Social Security disability claims. See 20 C.F.R. § 404.1520(a)(4); Garrison, 759 F.3d
28 at 1010. “The burden of proof is on the claimant at steps one through four, but shifts to the

1 Commissioner at step five.” Garrison, 759 F.3d at 1011. Here, the ALJ resolved Plaintiff's claim
2 at step five. At step five, the ALJ determines based on the claimant’s RFC whether the claimant
3 can make an adjustment to substantial gainful work other than his past relevant work. 20 C.F.R.
4 § 404.1520(g).

6 **IV. DISCUSSION**

7 The Court finds that the ALJ’s determination of non-disability is not supported by
8 substantial evidence. The ALJ mischaracterized Plaintiff’s testimony and erred in her
9 determination that Plaintiff’s allegations of disabling functional limitations were inconsistent with
10 Plaintiff’s activities. The Court finds that Plaintiff’s allegations of disabling functional limitations
11 are consistent with his activities, with the substantial evidence of record, and with a finding of
12 disability.

13 As the ALJ did not find evidence of malingering, the ALJ may only reject Plaintiff’s
14 testimony regarding the severity of his symptoms with **specific, clear, and convincing reasons**.
15 Garrison, 759 F.3d at 1014–15. “The clear and convincing standard is the most demanding
16 required in Social Security cases.” Id. at 1015 (quoting Moore v. Comm’r of Soc. Sec.
17 Admin., 278 F.3d 920, 924 (9th Cir. 2002)). The ALJ must identify with specificity “what
18 testimony is not credible and what evidence undermines the claimant’s complaints.” Lester v.
19 Chater, 81 F.3d 821, 834 (9th Cir. 1995).

20 The Court finds that the ALJ mischaracterized Plaintiff’s testimony when she found that
21 Plaintiff “has engaged in a somewhat normal level of daily activity and interaction.” AR 31.
22 Plaintiff in fact testified that he never goes to the movies, never eats out, never goes to church, has
23 no hobbies, and does nothing during the day besides watch television, stay on the porch, and
24 sometimes read. AR 51–52. Plaintiff testified that, in a typical day, he gets about two or three
25 hours of sleep at a time, watches television for an hour or two, and then falls back asleep;
26 occasionally he will get up to eat sandwich. AR 50.

27 The ALJ wrote that Plaintiff “goes out as needed,” “is able to go out alone,” and “shops in
28 stores.” AR 31–32. But Plaintiff testified that he only leaves his house to go to the grocery store

1 with his mother and to see his doctors. AR 51–52. Plaintiff further testified as follows:

2 A [] It's like I'm paranoid all day long and I'm scared to leave my house man.

3 Q So you came here today.

4 A My aunt – when I have someone like my aunt and my mom that is willing to go
5 with me wherever I got to go it makes it easier for me to leave to go but on my own
6 I'm – I'm really nervous.

7 Q But you can go to the store and get milk without her?

8 A We have a little Speedy Mart. It's directly across the street from the apartment
9 complex. I mean 100 yards and I'm there and back.

10 Q Okay.

11 A That doesn't really bother me but a lot of the times either she'll go with me or
12 it'll be nighttime and there's nobody out there anyway.

13 AR 55. In sum, Plaintiff's testimony reveals an extremely abnormal and limited level of daily
14 activity and interaction.

15 Plaintiff testified that he has panic attacks two to three times a week, lasting from 10
16 minutes to over an hour. AR 54–55. He testified that he takes Xanax when he feels a panic attack
17 coming on, which makes him sleep for 30 to 45 minutes. AR 56. Plaintiff's testimony is consistent
18 with the substantial medical evidence of record. Plaintiff has been treated for post-traumatic stress
19 disorder, depression, and anxiety since late 2014. Ex. Nos. 3F, 7F, 9F, 13F, 15F. Treatment notes
20 document his frequent panic attacks, his persistent lack of relationships, and his inability to engage
21 in activities outside the home. Ex. Nos. 9F, 13F. Plaintiff has been prescribed Zoloft, Wellbutrin,
22 and Xanax to address his mental health symptoms. Ex. Nos. 3F, 15F.

23 In evaluating the medical record, the ALJ erred in observing that “the claimant's mental
24 status examinations consistently revealed relatively mild findings.” AR 30. The ALJ in fact quotes
25 from a single mental status examination performed on August 19, 2014, which is copied in the
26 record four times. Ex. No. 3F at 4 (AR 306), 7F at 6 (AR 325), 11F at 5 (AR 337), 11F at 9 (AR
27 341). While this single mental status exam indicates normal findings, the ALJ was not permitted
28 to cherry-pick this isolated result to support a denial of benefits. Garrison, 759 F.3d at 1018 &
n.23 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154, 1164 (9th Cir. 2014). The only other
mental status examination in the record, performed on February 17, 2015, notes disheveled
grooming; an anxious, depressed, hopeless, and fearful mood; a confused and distracted thought
process; and an impaired attention span and memory. Ex. No. 13F at 42 (AR 429). Moreover,

1 each of these two mental status examinations is a mere snapshot of Plaintiff's functioning on a
2 particular day, and neither constitutes substantial evidence. More important for evaluating
3 Plaintiff's claim are the ongoing treatment notes in which Plaintiff has consistently reported panic
4 attacks, nightmares, feelings of hopelessness and worthlessness, and suicidal ideation, Ex. Nos.
5 9F, 13F, as well as Plaintiff's consistent and credible testimony detailing the effects of his
6 symptoms on his daily life.

7 The Ninth Circuit has established that where no outstanding issues need be resolved, and
8 where the ALJ would be required to award benefits on the basis of the record if the claimant's
9 testimony were credited, the Court will take the claimant's testimony as true and remand for an
10 award of benefits. Varney v. Sec'y of Health & Human Servs., 859 F.2d 1396, 1401 (9th Cir.
11 1988). The Circuit has devised a three-part credit-as-true standard, each part of which must be
12 satisfied in order for a court to remand to an ALJ with instructions to calculate and award benefits:

- 13 (1) the record has been fully developed and further administrative proceedings
14 would serve no useful purpose;
- 15 (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence,
16 whether claimant testimony or medical opinion; and
- 17 (3) if the improperly discredited evidence were credited as true, the ALJ would be
18 required to find the claimant disabled on remand.

19 Garrison, 759 F.3d at 1020 (9th Cir. 2014).

20 The Court finds that the record has been fully developed and further administrative
21 proceedings would serve no useful purpose. The Court further finds that, for the reasons stated
22 earlier in this order, the ALJ has failed to provide sufficient reasons for rejecting Plaintiff's
23 testimony and mischaracterized the evidence of record. Lastly, the Court finds that if the
24 improperly discredited evidence were credited as true, Plaintiff would be necessarily found
25 disabled on remand. Plaintiff has panic attack two to three times per week and the medication he
26 uses to treat these attacks causes him to fall asleep. These panic attacks would require Plaintiff to
27 take frequent, unscheduled breaks and would prevent regular attendance. Moreover, the current
28 frequency of Plaintiff's panic attacks should be situated in the context of his present lifestyle:
Plaintiff does not leave his home most days and cannot comfortably grocery shop without his
mother. Plaintiff's anxiety symptoms could only be expected to worsen given the social demands

1 of full-time work. In this case, the vocational expert testified that a person who could not maintain
2 regular attendance or be around the public could not perform any work. AR 60. Given the
3 vocational expert's testimony, and crediting Plaintiff's testimony as true, the Court finds that the
4 ALJ would be required to find Plaintiff disabled on remand.

5 The Court finds, however, that the ALJ did not err in observing that despite Plaintiff's
6 allegation of disability since October 2011, the record reveals no evidence of any treatment until
7 August 2014. AR 29, Ex. No. 3F. The Court therefore finds that the earliest disability onset date
8 supported by the record is August 19, 2014.

9
10 **V. CONCLUSION**

11 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Remand (ECF No. 15) is
12 GRANTED and Defendant's Cross-Motion to Affirm (ECF No. 18) is DENIED.

13 **IT IS FURTHER ORDERED** that this matter is remanded to Defendant Nancy A.
14 Berryhill, Acting Commissioner of Social Security, for an award of benefits with a disability onset
15 date of August 19, 2014.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter a final judgment in
17 favor of Plaintiff, and against Defendant. The Clerk of Court is instructed to close the case.

18
19 **DATED** this 10th day of May, 2019.



20
21 **RICHARD F. BOULWARE, II**
22 **UNITED STATES DISTRICT JUDGE**
23
24
25
26
27
28