IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Sean Magee,

Plaintiff,

v.

Nancy Berryhill,
Acting Commissioner of the Social Security Administration,

Defendant.

Civ. No. 3:16-cv-00917-MC

OPINION AND ORDER

MCSHANE, Judge:

Plaintiff Sean Magee brings this action for judicial review of the Commissioner's decision denying his application for disability insurance benefits (SSDI). This Court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Magee alleges disability due to a number of conditions including: affective spectrum disorder, dysthymic disorder, anxiety disorder, personality disorder, social phobia, ADHD, obesity, irritable bowel syndrome (IBS), somatoform disorder, and sleep apnea. After a hearing, the administrative law judge (ALJ) concluded Magee could perform the jobs of inventory clerk, forklift driver, and hand packager. TR 28.[1] Magee argues the ALJ erred in: 1) failing to explain his adverse credibility finding; 2) rejecting or ignoring medical opinions regarding absenteeism or tardiness; 3) distinguishing between telephonic and in-person interaction with the public; and

[1] "TR" refers to the Transcript of Social Security Administrative Record [ECF No. 8] provided by the Commissioner.

4) violating Mr. Magee's due process right to a full and fair hearing. Because the Commissioner's decision is based on proper legal standards and supported by substantial evidence, the Commissioner's decision is AFFIRMED.

STANDARD OF REVIEW

The reviewing court shall affirm the Commissioner's decision if the decision is based on proper legal standards and the legal findings are supported by substantial evidence in the record. 42 U.S.C. § 405(g); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). "Substantial evidence is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012) (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)). To determine whether substantial evidence exists, we review the administrative record as a whole, weighing both the evidence that supports and that which detracts from the ALJ's conclusion. *Davis v. Heckler*, 868 F.2d 323, 326 (9th Cir. 1989). "If the evidence can reasonably support either affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the Commissioner," and therefore must affirm. *Gutierrez v. Comm'r of Soc. Sec. Admin.*, 740 F.3d 519, 523 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)).

DISCUSSION

The Social Security Administration utilizes a five-step sequential evaluation to determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520 & 416.920 (2012). The initial burden of proof rests upon the claimant to meet the first four steps. If claimant satisfies his or her burden with respect to the first four steps, the burden shifts to the Commissioner for step five. 20 C.F.R. § 404.1520. At step five, the Commissioner's burden is to demonstrate that the claimant is

capable of making an adjustment to other work after considering the claimant's residual functional capacity (RFC), age, education, and work experience. *Id*. If the Commissioner fails to meet this burden, then the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). If, however, the Commissioner proves that the claimant is able to perform other work existing in significant numbers in the national economy, the claimant is not disabled. *Bustamante v. Massanari*, 262 F.3d 949, 953-54 (9th Cir. 2001).

Claimant alleges disability as of March 31, 2010, the date on which his last steady work ended. Claimant alleges that his symptoms, particularly anxiety, date back to his childhood. TR 205. The ALJ found that claimant suffers from the following severe impairments: affective disorder, anxiety disorder, personality disorder, irritable bowel syndrome (IBS), obesity, and somatoform disorder. TR 18. However, the ALJ determined that claimant has the RFC to perform a significant number of jobs existing in the national economy, including claimant's past relevant work. TR 20. Accordingly, the ALJ found plaintiff did not qualify as disabled under the Social Security Act. TR 20.

1. The ALJ's Adverse Credibility Determination

Plaintiff argues that ALJ erred in failing to explain his adverse credibility findings. The ALJ in this case concluded that "claimant's medically determinable impairments could reasonably be expected to cause alleged symptoms," but found claimant's "statements concerning the intensity, persistence, and limiting effects of these symptoms" to be not entirely credible. TR 21.

In evaluating the intensity and persistence of symptoms, the ALJ must take into consideration all available evidence, both medical evidence and other evidence, about how symptoms affect a claimant. 20 C.F.R. §404.1529(c). The *Cotton* test places a burden on the

claimant to show: 1) objective medical evidence of impairment and; 2) that the impairment, or combination of impairments, could reasonably produce some degree of the reported symptoms. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). Once a claimant meets the *Cotton* test, and there is not affirmative evidence of malingering, the ALJ may reject the claimant's testimony regarding the severity of their symptoms only by providing clear and convincing reasons supported by specific evidence in the record. *Id*. at 1283-84; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Examples of clear and convincing reasons include conflicting medical evidence, effective medical treatment, medical noncompliance, inconsistencies either in the claimant's testimony or between his testimony and his conduct, daily activities inconsistent with the alleged symptoms, a sparse work history, testimony that is vague or less than candid, and testimony from physicians and third parties about the nature, severity, and effect of the symptoms complained of. *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir. 2007); *Light v. Social Sec. Admin.*, 119 F.3d 789,792 (9th Cir. 1997).

The ALJ gave specific, clear and convincing reasons for discounting claimant's testimony regarding the intensity and persistence of claimant's symptoms. Claimant has undergone treatment for symptoms of anxiety, sleep apnea, depression, and IBS, among other ailments. Despite claimant's subjective complaints, medical reports show that he has stated various levels of improvement for most or all of these ailments throughout his years of treatment. The ALJ devotes a substantial portion of his decision explaining how specific medical records conflict with claimant's testimony regarding the intensity and persistence of his symptoms.

While counseling notes primarily report claimant's subjective complaints, the ALJ also considered claimant's medical management and treatment notes showing claimant benefits from

medication, objectively appears well-groomed, and does not exhibit behavior that would prevent him from full-time work. TR 24. The ALJ discusses medical records describing the use of a CPAP to successfully treat claimant's sleep apnea. TR 21. The ALJ also discusses the positive results that claimant experienced from therapy sessions regarding symptoms of anxiety and depression. TR 23-24.

The claimant's psychological examinations also contradict his testimony at the hearing and suggest claimant is preoccupied with his medical conditions. A neuropsychological examination by Dr. Walker indicates that claimant has a "significant preoccupation about his health and somatic functioning." Standing in stark contrast to claimant's subjective reports of cognitive impairments, Dr. Walker's report concluded that claimant's verbal intellect, overall working memory, executive functioning, and immediate recall were all found to be in the High-Average range. TR 22-23. TR 23. Similarly, Dr. Pollack's June 2010 evaluation states that claimant "interprets" his academic and health concerns as being "evidence of psychiatric conditions, such as mood or anxiety disorder, attention deficit disorder, and dyslexia." TR 21. Dr. Pollack, however, opined that claimant's primary issue was "a personality disorder with both Schizoid and avoidant features." TR 21.

There is abundant evidence in the record that therapy and medication were improving claimant's symptoms of anxiety and depression. TR 661 (on 3/28/13 claimant indicates to Onishi that depression is improving on Scopalamine); TR 598 (on 1/9/14 claimant indicates that he started with a new therapist and was having positive results including better mood and accomplishment of daily activities, though anxiety was still a problem); TR 524-25 ("Throughout the sessions the client reported that he had a decrease in his anxiety symptoms as well as a decrease in depression symptoms," though he "continues to struggle" with those

symptoms). This Court recognizes that, as noted by Dr. Pollack, there is no "magic bullet" that will cure a medical condition like anxiety disorder or depression, but claimant received medical treatment that provided moderate relief from his symptoms. Taken as a whole, the medical records provide strong evidence that claimant is not completely credible regarding his representations as to the intensity, persistence, and limiting effects of his medical conditions.

Finally, the claimant's daily living activities as described in the ALJ's opinion demonstrate that claimant can manage functions not consistent with his complaints of intensity. Specifically, claimant participates in social events such as a book club, going out to dinner, going out to movies, shopping, and using public transportation in addition to household chores such as vacuuming, doing laundry and dishes, and cleaning. TR 19.

There is substantial evidence on the record to support the ALJ's adverse credibility determination.

2. Rejecting or Ignoring Medical Opinions Regarding Absenteeism or Tardiness

Claimant argues that the ALJ erred in rejecting the opinions of various medical service providers stating that Mr. Magee would frequently be absent or tardy due to his medical conditions. The Court will address these issues separately.

A. Dr. Onishi's Opinion and Absenteeism

Where there exists conflicting medical evidence, the ALJ is charged with determining credibility and resolving any conflicts. *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012). When a treating physician's opinion is contradicted by another medical opinion, the ALJ may reject the opinion of a treating physician only by providing "specific and legitimate reasons supported by substantial evidence in the record." *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). Specific and legitimate reasons for rejecting an opinion include its reliance on a

claimant's discredited subjective complaints or its inconsistency with medical records or a claimant's daily activities. *Tommasetti*, 533 F.3d at 1040.

Dr. Onishi has been claimant's primary care physician since May 2012. TR 517. Dr. Onishi's statement dated May 2014 lists claimant's diagnoses as including fibromyalgia, depression, sleep apnea, ADHD, seasonal allergies, IBS, alopecia, hypogonadism, central hypothyroidism, diabetes, and erectile dysfunction. TR 517. Dr. Onishi opined that, due to his impairments, claimant cannot lift more than 5 pounds and can never climb, balance, stoop, kneel, crouch, crawl, reach, or handle. TR 518. Dr. Onishi also opined that claimant would miss two or more days of work per month and would have impaired concentration 10 to 20 percent of the standard workweek due to his impairments. TR 520. He further states that claimant is "unlikely to [be] able to work full 2 days straight but might [be] able to do several hours daily or several days per w[ee]k." TR 520. The ALJ decision accorded limited weight to these findings, stating that the record does not contain medical records or subjective complaints to support such extreme limitations as proposed by Dr. Onishi. TR 26.

The ALJ did not err in finding that Dr. Onishi's opinion was unsupported by the record. Although the record does, in fact, contain subjective complaints by claimant to support some of Dr. Onishi's opinion, those complaints were properly discredited by the ALJ as described above. "An ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti*, 533 F.3d at 1041. The claimant himself does not complain of symptoms that would justify the severe physical restrictions set forth by Dr. Onishi—in fact, the claimant testified at his hearing that the "main thing" keeping him from working was his "difficulty with anxiety," not physical ailments. TR 45.

Dr. Onishi did not provide any support for his claims regarding claimant's attendance. When asked to explain his opinion that claimant would miss two or more workdays per month due to his impairments, Dr. Onishi did not offer a medical basis for the conclusion—he only stated that it was unlikely that claimant could even work two days in a row. The ALJ is not required to accept a physician's opinion that is brief, conclusory, or inadequately supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). Dr. Onishi's opinion regarding absenteeism is not shared by any other physician in the record; in fact, it is contradicted by other physicians who opined that claimant "can be expected to maintain regular attendance with minimal absences." TR 61, TR 75. His opinion is brief, conclusory, and based on diagnoses that appear, from the limited medical records of claimant's visits to Dr. Onishi, to be based primarily on claimant's subjective complaints.

Because Dr. Onishi's opinion was based largely on claimant's subjective reporting and is inconsistent with claimant's medical records and daily living activities, the ALJ did not err in assigning little weight to his opinion.

B. Tardiness

Claimant argues that the ALJ erred in rejecting or ignoring medical opinions regarding tardiness as "vague" and in failing to include such a restriction in the RFC. In support of this argument, Mr. Magee refers to several cases discussing a SSD claimant's medical absences. *King v. Colvin*, No. 14-CV-02322-JSC, 2015 WL 1870755 (N.D. Cal. Apr. 23, 2015); *Orn*, 495 F.3d 625. *Lawson v. Colvin*, No. C13-5049-JCC, 2013 WL 6095518 (W.D. Wash. Nov. 20, 2013). However, all of these cases discuss absenteeism, not tardiness. In addition to the questionable legal grounds for including a tardiness limitation in claimant's RFC, such a limitation is not

supported by the record taken as a whole. The only medical record of frequent tardiness from a treating physician arises in two sentences from Dr. Scherr, and reads in full:

> During treatment, Mr. Magee had a chronic problem with tardiness, often 10-20 minutes late to sessions. That remained a subject of our work in part because it related to both motivation and resistance in treatment and in part because such difficulties likely affect his achievement or success at work and in other relationships.

This concern is echoed by reviewing Drs. Boyd and Greenspan, who note that although claimant might "frequently be tardy" due to his dysthymic and anxiety disorders, he "can be expected to maintain normal attendance with minimal absences." TR 61, TR 75. As the Commissioner points out in her brief, medical records of claimant's bi-weekly visits to psychologists Paul Guinther and Richard Nobles do not document chronic tardiness. Similarly, claimant made weekly visits to his therapist, Heather Repetto, over the course of a year, but there are no records of tardiness in her very detailed reports. The ALJ "is free to accept or reject restrictions in a hypothetical question that are not supported by substantial evidence." *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). For the foregoing reasons, the Court finds that ALJ did not err by not including a restriction for "tardiness" in claimant's RFC.

3. Distinguishing Between Telephonic and In-Person Interaction with the Public

While the ALJ determined that claimants RFC was limited with respect to in-person interaction with the public, no such limitation was placed on telephonic interaction. Claimant argues that the ALJ erred in failing to include in the RFC determination a limitation involving public contact by telephone.

Claimant previously worked for HSBC for three years in the credit card division. TR 214. According to his own testimony at the hearing, he fielded deescalated calls when "the

representatives were unable to handle the caller, or the customer requested a supervisor." TR 39. Fielding calls from customers who were upset enough to ask to speak to a manager demonstrates an ability to interact with the public via telephone under stressful circumstances. Claimant asserts that he has suffered from the relevant medical condition, social anxiety, since childhood. Therefore, the social anxiety preceded claimant's work at HSBC's call center and was apparently managed sufficiently to allow claimant to remain gainfully employed there. The ALJ noted that plaintiff's social activities include "keeping in touch with others via telephone." TR 19. Similarly, the ALJ noted plaintiff's mother's testimony that his social activities include "talking on the phone." TR 27. Claimant's prior work at a call center and plaintiff's telephonic social activities constitute substantial evidence for the ALJ's distinction between interaction with the public telephonically versus in-person.

4. Defendant's Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Brief

Claimant has submitted an affidavit in support of his argument that the ALJ failed to conduct a full and fair hearing in this case. Defendant has moved to strike this affidavit, citing 42 U.S.C. §405(g) as limiting a federal court's judicial review to the closed administrative record. Because the Court considers the affidavit for purposes other than proving disability, the defendant's motion is denied. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 972–73 (9th Cir. 2006)("When a plan administrator has failed to follow a procedural requirement of ERISA, the court may have to consider evidence outside the administrative record. For example, if the administrator did not provide a full and fair hearing, as required by ERISA, 29 U.S.C. § 1133(2), the court must be in a position to assess the effect of that failure and, before it can do so, must permit the participant to present additional evidence.")

5. Failure to Conduct a Full and Fair Hearing

Claimant argues that his due process right to a full and fair hearing was violated as a result of the ALJ's comments at the hearing. During the claimant's testimony at the hearing, the transcript shows the following exchange:

> ALJ: Okay. Do me a favor, okay, Mr. Magee. Try to just listen to his question and then answer that. Because these hearings usually don't last that long because there's no reason for them. So what happens is he asks you a question, I ask you a question, you know, you just keep on going.
>
> CLMT: I'll try to be--
>
> ALJ: I understand it's important to you but it's also important, I've got another case coming up in 10 minutes so we need to kind of speed it up a little. Okay?

TR. 46-47.

The affidavit presented along with claimant's brief details other circumstances of the hearing:

> 6. The written record will not show this, but the ALJ mimicked my way of speaking, and told me he didn't have time to hear my case.
> 7. The judge's interruption made me feel disrespected, and like the judge did not care what I had to say, but only wanted me to get out of the way.

ECF No. 20 p. 2. The affidavit also recites some testimony claimant would have given if he had not been interrupted. In making its determination, the Court considers the allegations in the affidavit.

Claimant alleges that the ALJ's comments and behavior exacerbated claimant's social anxiety, which in turn had the effect of restricting the remainder of his testimony. The transcript

shows that the hearing lasted from 3:05 p.m. to 3:28 p.m., for a total of 23 minutes. Claimant argues that under the totality of the circumstances (the brevity of the hearing, the ALJ's comments, and the comments' effects on the claimant), his due process rights were violated. Claimant asks the Court to remand this case for a full and fair hearing of his claim.

Plaintiff cites several specific cases in support of his due process argument. The most relevant cases—those involving due process complaints resulting from the conduct of an ALJ during a Social Security disability benefits hearing—are *Vartanyan v. Chater*, 199 F.3d 1334 (9th Cir. 1999)(unpublished)[2], *Frampton v. Astrue*, 405 F. App'x 112 (9th Cir. 2010)(unpublished), and *Ventura v. Shalala*, 55 F.3d 900 (3d Cir. 1995).

The court in *Vartanyan* addressed whether the ALJ's actions during a hearing amounted to impermissible bias. 199 F.3d at *1. An ALJ is presumed to be unbiased and the claimant bears the burden of showing otherwise. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999). This burden for showing that an ALJ was biased is very heavy, and depends on a showing that "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir.1993)(internal quotations omitted). In *Vartanyan*, the ALJ announced during the hearing that he would enter a copy of a *New York Times* article into the record as an exhibit. 199 F.3d at *1. The article had two headlines: "Agency is Called Lax in Disability Benefits Fraud" and "An effort to weed out 'crooks' who cost taxpayers millions of dollars a year." *Id.* The article reported that many immigrants defrauded the Social Security Administration in applying for disability benefits by "feigning mental illness and providing false

[2] District courts may consider unpublished opinions as persuasive authority; however, such opinions are not binding.

medical histories." *Id.* The ALJ in *Vartanyan* went further by asking claimant's daughter, a witness at the hearing, whether she was receiving AFDC (Aid to Families with Dependent Children) benefits. *Id.* at *2. When she responded affirmatively, the ALJ replied "Congress is going to do something about that in this session, maybe." *Id.* The 9th Circuit said that these statements by the ALJ during the hearing "cast[] serious doubt on the ALJ's judgment, if not his impartiality. It was inexcusable, improper, and insensitive to introduce this exhibit into evidence." *Id.* Despite the *Vartanyan* court's clear opinion that the ALJ's comments and actions were inappropriate, it found that they did not rise to the level of bias warranting a rehearing.

The 9th Circuit was similarly unwilling to remand for a new hearing in *Frampton*, which specifically addressed limitations to the total time allotted for a hearing. Because the ALJ in *Frampton* only allotted one hour to the hearing, the ALJ was unable to hear the testimony of her husband. 405 F. App'x at 113. The ALJ, however, offered to consider a supplemental hearing and allowed claimant to submit written testimony in lieu of an additional hearing. *Id.* The court concluded that, although the restriction of the hearing to one hour "causes some concern," the facts did not amount to a violation of Frampton's due process rights. *Id.*

The 3rd Circuit Court of Appeals in *Ventura* did remand that case for a new hearing on the grounds that the ALJ's conduct during the SSDI hearing demonstrated bias which violated claimant's due process right to a full and fair hearing. 55 F.3d at 902. The ALJ in that case repeatedly and aggressively interrupted the claimant and the claimant's lay counsel. *Id.* at 903-04. The ALJ in *Ventura* said the following with respect to claimant's former attorney:

> Claimant: There have been four days in the last six years when I haven't had pain.
> ALJ: How come you didn't tell me the truth about the attorneys?
> Claimant: I told you every—I answered every question.
> ALJ: But what I asked you about the attorneys, you didn't tell me the truth. You didn't tell me the truth about why they didn't want her sanctioned.

> Claimant: Your—I—
> ALJ: Why didn't you? That's what I'm asking.
> Rep.: Answer the question.
> Claimant: You know, I—you know. Are you the doctor?
> ALJ: Answer my question.
> Claimant: I will.
> ALJ: Now. Answer my question, sir.
> Claimant: You think I'm going to be—truly I'm sorry, but I'm not afraid. I'm just not afraid.
> ALJ: I don't care if you[‘re] afraid or not. Answer my question. Why didn't you tell me the truth about the attorneys.

Id. at 903.

The facts before us are far less severe than either *Vartanyan* or *Ventura*. The ALJ in this case said, trying to hasten Mr. Magee’s testimony, that “these hearings usually don’t last that long *because there’s no reason for them*.” TR 46-47. Telling a claimant that there is no *reason* for their hearing would be inappropriate and demoralizing for anyone hoping to convince a judge of the merits of their case. It is a particularly insensitive comment to make in light of the remarkably brief hearing afforded to a claimant with a well-documented history of social anxiety.

However, claimant has not cleared the high bar set by the 9th Circuit to overcome the presumption that an ALJ is unbiased. It is unclear from the written transcript whether the ALJ was maligning the hearing or whether the ALJ’s statement was anything more than an ill-phrased attempt to quicken the pace of testimony. I would like to believe the latter but this does not diminish the demoralizing effect on the claimant. He deserved better. That being said, the comments here do not resemble those in *Ventura*. This Court also considers it relevant that Mr. Magee, unlike the claimant in *Ventura*, was represented by an attorney capable of skillfully developing the record.

The final issue is what weight the Court should give to the fact that the hearing lasted only 23 minutes. The 9th Circuit in *Frampton* expressed "some concern" where the time for the hearing was limited to one hour, but was afforded an option to submit further testimony in writing or at a later hearing. 405 F. App'x at 113. The Court is unwilling to assign too much weight to the length of the hearing because claimant has not clearly explained what additional testimony he would have presented. Claimant's affidavit did not contain any significant new testimony that would sway the record in claimant's favor. Additionally, the hearing transcript shows no difficulty on part of Plaintiff's attorney to develop the record to his satisfaction. When plaintiff's attorney completed his examination of his client he said "[o]kay. All right. I don't have any other questions." TR 48. He then allowed the ALJ to proceed to question the Vocational Expert (VE). When the ALJ asked if he had any questions for the VE, claimant's attorney's only question was "[c]an I have the DOT code for that customer service job you identified?" Claimant's attorney's ability to develop the record weighs significantly against claimant's argument that he was denied his due process right to a full and fair hearing.

For the above reasons, the Court finds that claimant's due process rights to a full and fair hearing were not violated.

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CONCLUSION

The Commissioner's decision that plaintiff is not disabled was supported by substantial evidence in the record and is therefore AFFIRMED. This case is dismissed.

IT IS SO ORDERED.

DATED this 19th day of January, 2017.

_____/s/ Michael J. McShane _____
Michael McShane
United States District Judge