UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JAKE R.[1]

Plaintiff,

v.

COMMISSIONER,
Social Security Administration,

Defendant.

Case No. 3:18-cv-00436-JO

OPINION AND ORDER

JONES, Judge:

Jake R. (Plaintiff) seeks judicial review of the final decision by the Commissioner of Social Security (Commissioner) denying his application for Supplemental Security Income (SSI) disability payments under Tile XVI of the Social Security Act (the Act). This court has jurisdiction to review the Commissioner's decision pursuant to 42 U.S.C. § 405(g). Because the

[1] In the interest of privacy, this Opinion and Order uses only the first name and the initial of the last name of the non-governmental party or parties in this case. Where applicable, this opinion uses the same designation for a non-governmental party's immediate family member(s).

Commissioner's decision is not supported by substantial evidence, I reverse and remand for an immediate calculation and award of benefits.

BACKGROUND

Plaintiff was born in 1989. He suffers from congenital hydrocephalus, a rare condition "in which the primary characteristic is excessive accumulation of fluid in the brain." *Groom v. Colvin*, 222 F. Supp. 3d 915, 918 n.1 (D. Or. 2016). To prevent the buildup of cerebrospinal fluid in his brain, Plaintiff has had a shunt surgically installed in his skull since he was eight months old. Tr. 432. The shunt tubing drains fluid into Plaintiff's abdominal cavity. Tr. 646.

Plaintiff suffers from chronic headaches associated with hydrocephalus. Plaintiff stated that he has three to four "pressure" headaches per week, varying in severity. Tr. 60, Tr. 976. The headaches last from one hour to five or six hours, often accompanied by nausea, fatigue, and irritability. Tr. 60, 62, 71. Plaintiff has undergone nine surgical revisions to correct problems with the shunt. Tr. 27, 662.

Virginia Silvey, Ed. D., director of the Child Development Clinic Program at Oregon Health & Science University (OHSU), examined Plaintiff when he was about eleven years old. Dr. Silvey reported that Plaintiff, like others with hydrocephalus "[c]haracteristically . . . display significant difficulty with executive function." Tr. 901 (executive function defined as "the ability to initiate, shift, inhibit, and sustain, to plan, organize, and develop strategies or plans"). Dr. Silvey reported that Plaintiff had "significant difficulty" with memory, including being confused by directions comprising three steps or more; appearing to be disorganized, confused, or absent minded; and had difficulty completing tasks because of an inability to follow instructions. Tr. 901. Dr. Silvey reported that persons with hydrocephalus "can be viewed by others as being passive aggressive or intentionally noncompliant, when in actuality they are having difficulty with

generalized organization." Tr. 901. The extensive medical record shows that Plaintiff has continued exhibit these psychological traits throughout the relevant time.

Plaintiff suffers from social anxiety, which is treated with Zoloft. Tr. 62-63. He also suffers from attention deficit hyperactivity disorder (ADHD), which has been treated with either Adderall or a form of Adderall since Plaintiff was in the second grade. Tr. 63, 360

In 2014, Plaintiff applied for SSI, alleging disability beginning in 2001. After the agency denied Plaintiff's claim, Plaintiff received a hearing before an Administrative Law Judge (ALJ) in July 2016 and a supplemental hearing in December 2016. Tr. 22. In March 2017, the ALJ issued her decision, finding Plaintiff not disabled. Tr. 22-32. After the Appeals Council denied Plaintiff's request for review, Plaintiff timely filed this action seeking judicial review of the denial of benefits.

STANDARD OF REVIEW

The reviewing court must affirm the Commissioner's decision if it is based on proper legal standards and supported by substantial evidence in the record. 42 U.S.C. § 405(g); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). This court must weigh the evidence that supports and detracts from the ALJ's conclusion and "'may not affirm simply by isolating a specific quantum of supporting evidence.'" *Garrison v. Colvin*, 759 F.3d 995, 1009-10 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). When the evidence is susceptible to more than one rational interpretation, the court must uphold the Commissioner's decision if it is "supported by inferences reasonably drawn from the record." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citation omitted). The reviewing court may not affirm the Commissioner's decision based on a ground that the agency did not invoke in making its decision. *Stout v. Comm'r*, 454 F.3d 1050, 1054 (9th Cir. 2006).

THE ALJ'S FINDINGS ON THE FIVE-STEP SEQUENTIAL INQUIRY

The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). To determine whether a claimant is disabled, the ALJ uses a five-step sequential inquiry. *See* 20 C.F.R. §§ 404.1520, 416.920; *Lounsburry v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

Here, at step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since 2014, the application date. Tr. 24.

At step two, the ALJ found Plaintiff had the following severe impairments: "headaches, hydrocephalus, and mental health conditions described as ADHD and anxiety disorder." Tr. 24.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment. Tr. 24. The ALJ then assessed Plaintiff's residual functional capacity (RFC), finding that Plaintiff could perform medium work as defined by 20 C.F.R. § 404.967(c), "except frequent climbing of ramps and stairs, climbing of ladders, ropes and scaffolds, kneeling, and crouching; no exposure to hazards such as moving mechanical parts, unprotected heights; noise level would be at most moderate; he is limited to performing simple and routine tasks; limited to simple work related decisions; limited to occasional interaction with coworkers, and no interaction with the public." Tr. 26.

At step four, the ALJ found Plaintiff had no past relevant work. Tr. 31.

At step five, the burden of proof shifts to the Commissioner to show that the claimant can perform other work that exists in significant numbers in the national economy, considering the claimant's RFC, age, education, and work experience. *Bustamonte v. Massanari*, 262 F.3d 949,

953-54 (9th Cir. 2001); *Tackett v. Apfel,* 180 F.3d 1094, 1100 (9th Cir. 1999). Here, based on the testimony of a vocational expert, the ALJ found Plaintiff could perform jobs that exist in significant numbers in the national economy, including the representative occupations of office cleaner, electronics worker, and hand packager/inspector. Tr. 32. The ALJ therefore found Plaintiff had not been disabled since April 2014, when he applied for SSI.

DISCUSSION

Plaintiff argues that the ALJ erred in (1) finding that Plaintiff's testimony was not fully credible; (2) not giving proper weight to the medical opinion evidence; (3) improperly assessing lay witness evidence; and (4) failing to incorporate all of the medical findings in Plaintiff's RFC.

I. The ALJ's Assessment of Plaintiff's Testimony

The ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [Plaintiff's] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record." Tr. 27. Because the record here contains no affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of . . . symptoms only by offering specific, clear and convincing reasons for doing so." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996) (citation omitted). "'The clear and convincing standard is the most demanding required in Social Security cases.'" *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm'r*, 278 F.3d 920, 924 (9th Cir. 2002)).

When assessing a claimant's credibility, the ALJ must consider all the evidence in the record, including objective medical evidence, medical opinions, treatment history, daily activities, work history, third-party observations of the claimant's functional limitations, and any other evidence that bears on the consistency and veracity of the claimant's statements. *Tommasetti,* 533

F.3d at 1039; *Smolen*, 80 F.3d at 1284; SSR 96-97p, 1996 WL 374186, at *5. Additionally, the ALJ may use ordinary techniques of credibility evaluation, such as inconsistent statements, testimony that appears less than candid, and an unexplained failure to follow a prescribed course of treatment. *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 587, 602-04 (9th Cir. 1989).

A. Plaintiff's Statements About His Limitations

Plaintiff submitted a Function Report in 2014. Tr. 232-39. He stated that he is "not really able to live alone," and was living with his mother and his four-year-old daughter. He took care of his daughter with his mother's help. He helped to care for a cat, but forgot to feed the cat or clean its litter box when his mother was not present. His mother needed to remind him "constantly" to groom himself, to take his medications, and to eat, leaving notes for him. Tr. 234-35. Plaintiff was irritated by the reminders.

Plaintiff stated that he could follow only one or two instructions at a time, and often misinterprets what others say. Tr. 232. He is "very black & white in thinking (very concrete)" and takes things literally. Tr. 232. He has difficulty with authority figures. He was fired from a job after he responded to his supervisor calling him a "retard" by calling the supervisor a retard, with added profanity. Tr. 237.

Plaintiff has never had a driver's license because driving scares him. Tr. 235. His mother drives Plaintiff about three times a month to shop for groceries. Plaintiff's mother helps him with money issues because he has "never been able to manage money." Tr. 236. Plaintiff has never managed a checking or savings account. Tr. 236.

At the hearing in July 2016, Plaintiff testified that he was living with his girlfriend, his five-year-old daughter, and his one-year-old son. Plaintiff testified that he suffers "massive"

headaches three or four times a week, which may last from one hour to five or six hours. Tr. 60. Aspirin and similar analgesics do not help.

Plaintiff did some household chores, such as putting dishes away, but often forgot to do so. When he has "a large headache," he lies down and the dishes will not be done. Tr. 74. When Plaintiff is not suffering from a headache, he will walk with his daughter four blocks to school. He calls friends to pick her up at school if he has a headache.

He does not know how to use the washer or dryer, testifying that "my girlfriend needs to teach me how to use that. I know it sounds bad." Tr. 67. Plaintiff states that he tries to get his daughter to vacuum for him.

While his girlfriend works during the day as a cashier, Plaintiff cares for the children. He testified that he "tried to make breakfast, I mean cereal or Pop-Tarts." Tr. 65. Plaintiff does not use a stove because he forgets to turn it off. For lunch, Plaintiff makes peanut butter sandwiches or microwaves Top Ramen. His girlfriend makes dinner.

Plaintiff stated that he has two friends, Genevieve and Charlie. Plaintiff testified that Charlie stops by two or three times a week "just to say hi" only because Plaintiff's mother wants him to check on Plaintiff. Tr. 69. Plaintiff testified that he played videogames at night "maybe a couple hours a week." Tr. 69.

B. The ALJ's Findings on Plaintiff's Symptom Testimony

The ALJ found that Plaintiff's activities of daily living, including taking care of his children, playing videogames on weekends, doing housework, "spending time socially with his friends," shows that Plaintiff can "perform simple routine tasks," and is capable of social interactions. Tr. 29. However, "disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations," *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.

1998), and "the mere fact that a plaintiff has carried on with certain daily activities, such as grocery shopping . . . does not in any way detract from his credibility," *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005) (citing *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)). To cast doubt on a claimant's credibility, the activity must be "inconsistent with claimant's claimed limitations." *Reddick*, 157 F.3d at 722.

Here, although Plaintiff attempted to care for his children and do household chores, his testimony indicates that he was limited by his cognitive impairments and headaches, relying on his girlfriend and his mother for direction and assistance. For example, Plaintiff gave his children meals that required almost no preparation, and could not operate the washer and dryer, although he hoped his girlfriend would teach him to do so. Plaintiff also suffered from severe headaches about twice a week that prevented him from doing chores or caring for his children. I conclude that Plaintiff's limited ability to do household chores is not substantial evidence that he could work in a competitive job environment. *See Kelsi R. v. Berryhill*, No. 6:17-cv-02046-MK, 2019 WL 2028531, at *4 (D. Or. May 8, 2019) (the plaintiff's ability to care for her children with the assistance of her mother and fiancé did not undermine her assertion of disability). Similarly, spending time with one or two friends, or playing videogames two hours per week, does not discredit Plaintiff's testimony about his difficulty with social interactions, which is amply supported by the record. I conclude that the ALJ's credibility finding based on Plaintiff's activities of daily living is not supported by clear and convincing evidence.

The ALJ also found that the medical evidence did not support Plaintiff's allegations of disabling limitations. However, the ALJ focused on times when Plaintiff's symptoms were in remission. Plaintiff did sometimes experience relief from headaches and nausea after his shunt was adjusted, Tr. 743, Tr. 585, but the medical record shows that throughout the relevant time,

Plaintiff continued to suffer from chronic headaches, nausea, vomiting, acute dizziness, Tr. 586, Tr. 774, and coughing up blood, Tr. 941. For example, during 2015, Plaintiff required multiple medical appointments to deal with shunt problems, which were causing persistent severe headaches, nausea, and lethargy. Tr. 424 (January 2015 report); Tr. 747 (April 2015 report, noting headaches and vomiting); Tr. 763 (July 2015 report, noting "increased headache frequency and severity since his last shunt adjustment"); Tr. 789 (August 2015 report, noting "5/10 [severity] headache, dizziness, and vomiting"); Tr. 804 (October 2015 report, noting very severe headaches and blurred vision).

"In evaluating whether the claimant satisfies the disability criteria, the Commissioner must evaluate the claimant's 'ability to work on a *sustained* basis.' Occasional symptom-free periods—and even the sporadic ability to work—are not inconsistent with disability." *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) (quoting 20 C.F.R. § 404.1512(a) (emphasis added by *Lester*)). The Ninth Circuit has explained that "it is error to reject a claimant's testimony merely because symptoms wax and wane in the course of treatment. Cycles of improvement and debilitating symptoms are a common occurrence, and in such circumstances it is error for an ALJ to pick out a few isolated instances of improvement over a period of months or years and to treat them as a basis for concluding a claimant is capable of working." *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014). Hydrocephalus is a rare condition, and the apparently intermittent and variable nature of its symptoms may mask the severity of the impairment. *See, e.g., Aaron v. Astrue*, No. 1:07-cv-1303-SMS, 2008 WL 4502268, at *8 (E.D. Cal. Oct. 7, 2008) (rejecting ALJ's analysis of the claimant's hydrocephalus, stating that the ALJ's chronology "reflects a record that shows symptoms increasing with worsening headaches requiring morphine, consistent ventricular dilation, agenesis of the corpus callosum, and continuing intermittent incapacity due to

Plaintiff's hydrocephalus and associated symptoms."). Here, I conclude that the ALJ erred in focusing on "a few isolated instances of improvement" to discredit Plaintiff, rather than evaluating the record as a whole.

As a further ground for discrediting Plaintiff, the ALJ stated that Plaintiff had "established care at an internal medicine clinic in early 2015" because he needed "help with getting [SSI]. This strongly suggests he was not seeking treatment for his symptoms, but looking for a healthcare provider to support his disability applications." Tr. 28.

The ALJ was referring to Plaintiff's appointment with a physician at OHSU, Melanie Sauvain, M.D., M.P.H. (Master of Public Health), in January 2015, on a referral from Plaintiff's treating neurologist. Tr. 736-41. Dr. Souvain reported that Plaintiff was seeking medical information for a disability application because his medical records had been "lost and eventually SS was withdrawn." Tr. 736. Plaintiff's attempt to regain lost medical information does not undermine his credibility. As Plaintiff argues, Social Security rules do not prohibit a claimant from trying to provide medical records that are "as complete as possible so that an ALJ may make a proper determination." Pl.'s Opening Br. 22.

As to a claimant's motivation to seek benefits, this court has explained,

> By definition, every claimant who applies for Title II benefits[2] does so with the knowledge—and intent—of pecuniary gain. That is the very purpose of applying for Title II benefits. The same motivation afflicts every applicant for workers compensation benefits, and every personal injury plaintiff. If the desire or expectation of obtaining benefits were by itself sufficient to discredit a claimant's testimony, then no claimant (or their spouse, or friends, or family) would ever be found credible.

Ratto v. Secretary, 839 F. Supp. 1415, 1428-29 (D. Or.1993). Although "an ALJ may consider motivation and the issue of secondary gain in evaluating symptom testimony, she must identify

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[2] Although here Plaintiff seeks SSI under Title XVI, not disability benefits under Title II, the same reasoning applies.

specific, clear and convincing evidence to do so." *Lehigh v. Comm'r*, No. 6:16-cv-0902-JR, 2017 WL 4324545, at *7 (D. Or. Sept. 5, 2017) (citing *Burrell v. Colvin*, 775 F.3d 1133, 1139–40 (9th Cir. 2014)), *adopted*, 2017 WL 4322819 (D. Or. Sept. 25, 2017). Here, Plaintiff's efforts to provide evidence of disability are not clear and convincing evidence of secondary gain. There is no evidence that Dr. Souvain acted as Plaintiff's advocate rather than as an objective provider of health care. Her report is relevant as medical evidence of Plaintiff's impairments. Dr. Souvain noted that during the examination, Plaintiff's infant nephew was present, and that while Plaintiff was "loving to his nephew," he "simply did not perceive the risk" when his nephew was in danger of falling off a table, requiring Plaintiff's mother to intervene. Tr. 738, 741. Based on her examination, Dr. Souvain suspected that Plaintiff had significant cognitive issues. Tr. 739.

The ALJ also stated that Plaintiff had "relatively little mental health treatment since the application date." Tr. 28. The ALJ noted that Plaintiff's prescriptions for anxiety and ADHD medications were managed by a primary care physician rather than a mental health specialist. Tr. 28. The ALJ found that Plaintiff's conservative mental health treatment was "generally inconsistent with the extent of the claimant's alleged mental symptoms and limitations," and "strongly suggests his mental symptoms are not a level that would keep him from sustaining fulltime work." Tr. 28.

I agree with Plaintiff that his relatively conservative mental health treatment does not discredit his testimony about the seriousness of his symptoms. A person suffering from mental health issues may not show the best judgment, and may fail to seek treatment. "' [I]t is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.'" *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (quoting *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir.1989)). Here, the record contains multiple

examples of Plaintiff's difficulty with executive functioning and controlling anger, which has caused him to get into fights at school over teasing, to lose a job, and even to having his mother seek police assistance in 2016 for his "extreme behavior." Tr. 56, Tr. 369, Tr. 463, Tr. 583. The record indicates that issues with the shunt may affect Plaintiff's ability to control his anger. Tr. 963 (in an October 2016 report, Plaintiff stated the shunt was causing "significant discomfort," and his neurologist told him that "his abilities to control anger may be very limited right now.").

I conclude that the ALJ's credibility findings on Plaintiff's statements are not supported by clear and convincing evidence, and that this error is harmful.

II. The ALJ's Evaluation of Medical Opinion Evidence

The ALJ is responsible for resolving ambiguities and conflicts in the medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). "The medical opinion of a claimant's treating physician is given 'controlling weight' so long as it 'is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record.'" *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017) (quoting 20 C.F.R. § 404.1527(c)(2)). "The Commissioner is required to give weight not only to the treating physician's clinical findings and interpretation of test results, but also to his subjective judgments." *Lester v. Chater*, 81 F.3d 821, 832-33 (9th Cir. 1995).

The ALJ must provide clear and convincing reasons for rejecting the uncontradicted medical opinion of a treating or examining physician, and must provide specific and legitimate reasons for rejecting contradicted medical opinions. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). "'The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making

findings.'" *Magallanes*, 881 F.2d at 751 (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)).

A. The Psychological Evaluation of James Powell, Psy. D.

In May 2014, Dr. James Powell conducted a neuropsychological assessment of Plaintiff and issued a report on his findings. Tr. 359-73. The ALJ gave significant weight to most of Dr. Powell's findings. Tr. 29. However, the ALJ rejected Dr. Powell's opinion that Plaintiff would require at least twelve months of vocational and mental health support before he could maintain employment. The ALJ stated that Dr. Powell's opinion on this issue appeared "to be based on non-psychological factors such as the claimant's lack of significant work experience and education history." Tr. 29-30. I conclude that ALJ erred in rejecting this portion of Dr. Powell's report, which is not contradicted by any treating or examining medical provider.

During his examination of Plaintiff, Dr. Powell administered the Wechsler Adult Intelligence Scale (WAIS-IV); a personality assessment, the Symptom Checklist-90-Revised; an attention deficit disorder assessment; and the Adaptive Behavior Assessment System. Dr. Powell found that Plaintiff "appeared to show a good level of compliance and effort during the evaluation." Tr. 364. Dr. Powell noted that Plaintiff's personality assessment scores showed "extremely high levels of anger and frustration," with "slightly elevated" paranoid ideation. Tr. 369. Plaintiff told Dr. Powell that he was "quite a bit distressed" by "having trouble remembering things, temper outbursts that he cannot control and trouble falling asleep." Tr. 369. Plaintiff's tests showed "difficulties and distress suggestive of a cognitive impairment syndrome." Tr. 369.

Plaintiff's Full Scale IQ score was 105, which is in the 65th percentile. However, Plaintiff scored in the 18th percentile for working memory, in the 21st percentile for delayed memory, in the 37th percentile in attention and concentration abilities, and in the 25th percentile for

arithmetic. Tr. 365, Tr. 366, Tr. 368. Because of his learning disabilities, Plaintiff was placed in an Individualized Education Program (IEP) from the fifth grade until his junior year in high school. Tr. 360. He graduated from St. Helens High School with a 1.34 grade point average. Tr. 362.

Dr. Powell found that the test results showed ADD is "highly probable." Tr. 369. ADD caused Plaintiff to have excessive difficulty getting started on tasks, to be easily sidetracked, excessively forgetful about what was just said, easily frustrated and excessively impatient, procrastinating excessively, disorganized, with difficulty keeping plans, forgetting to do tasks, being sensitive to criticism, irritated easily, difficulty expressing anger appropriately, misunderstanding directions, and difficulty memorizing information. Tr. 369.

Based on Plaintiff's adaptive assessment ratings, Dr. Powell found that compared to others his age, Plaintiff "is functioning at the 0.2 percentile and his overall level of functioning can be described as being Extremely Low." Tr. 370. In individual skills, Plaintiff fell in the 5th percentile in communication and community use, while all of his other scores were in the 2nd percentile or below, including home living, leisure, self-care, self-direction, and socialization. Tr. 371. Dr. Powell concluded that "the duration of rehabilitation to the point of [Plaintiff] being able to maintain employment could easily take a period of 12 months." Tr. 372. Dr. Powell stated that Plaintiff had a good prognosis of maintaining employment in the future, "but would likely depend upon the level of his motivation to move in this direction. There also does appear to be the presence of some dependency features." Tr. 372.

The ALJ gave little weight to Dr. Powell's finding that Plaintiff needed at least a year of vocational rehabilitation before he would be able to work, stating that the "neuropsychological testing did not show that the claimant's cognitive functioning was so impaired that he could not

learn how to do simple routine work with normal demonstrations and orientation periods." Tr. 30. However, Dr. Powell is a psychologist who specializes in interpreting neuropsychological tests, and his opinion was based on the results of those tests. Dr. Powell did not address Plaintiff's physical impairments, such as chronic headaches and nausea. As noted, although Plaintiff's overall IQ score was a little above average, his scores in memory and concentration tests were well below average, and his functioning was in the 2nd percentile or below compared to others his age. Dr. Powell's conclusions are supported by Dr. Souvain's opinion that Plaintiff's judgment was severely impaired. Because the Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which . . . can be expected to last for a continuous period of not less than 12 months," 42 U.S.C. § 423(d)(1)(A), Dr. Powell's finding on that Plaintiff would need extensive vocational rehabilitation undermines the ALJ's conclusion that Plaintiff is not disabled.

B. Reports of Ian Penner, Physician's Assistant

Penner, a certified physician's assistant, saw Plaintiff three to five times per year between 2010 and 2016. Tr. 636. Penner reported in 2016 that Plaintiff suffered from congenital hydrocephalus and ADHD, which caused "fatigue, nausea, loss of appetite, learning difficulties, dizziness, insomnia, depression." Tr. 636. Penner opined that Plaintiff "appears to have the emotional capacity to deal with a low-volume, low stress work environment. However, his attention, focus and balance issues would likely preclude full-time or physically demanding employment." Tr. 636. Penner stated that Plaintiff should be further assessed by a psychologist and physical therapist.

The ALJ gave "[s]ome but less than great weight" to Penner's opinion. Tr. 30. The ALJ stated that Penner's opinion "appears to be based mostly on the claimant's subjective statements." Tr. 30. The ALJ noted that Penner is not a mental health specialist.

The ALJ reasonably discounted Penner's opinion as to Plaintiff's mental health issues. However, Penner has extensive experience treating Plaintiff for the physical symptoms associated with hydrocephalus, including headaches, nausea, and lethargy. The medical opinions of treating sources should be evaluated based on the length of the treatment relationship and the frequency of examination, consistency with the record as a whole, and specialization. 20 C.F.R. § 404.1527(c). Here, Penner observed Plaintiff over the course of six years, and his observations are consistent with the record as a whole. I conclude that the ALJ erred in failing to give weight Penner's opinions on the severity of Plaintiff's non-psychological impairments.

III. The ALJ's Assessment of Lay Witness Evidence

Plaintiff's mother, Julianne C., and a friend, Genevieve H., submitted third-party statements about Plaintiff's functioning. "Lay testimony as to a claimant's symptoms or how an impairment affects the claimant's ability to work is competent evidence that the ALJ must take into account." *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) ("Descriptions by friends and family members in a position to observe a claimant's symptoms and daily activities have routinely been treated as competent evidence."). Lay witnesses "can often tell whether someone is suffering or merely malingering," which "is particularly true of witnesses who see the claimant on a daily basis." *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To reject lay witness testimony, the ALJ must provide "reasons that are germane to each witness." *Id.*

Here, the ALJ gave little weight to the lay witness statements, finding that their descriptions of Plaintiff's symptoms were inconsistent with Plaintiff's response to treatment, and the objective evidence of his mental functioning. Because I have found that the ALJ's findings on Plaintiff's credibility and response to treatment are not supported by substantial evidence, the ALJ's findings on lay witness statements are also not supported by substantial evidence.

IV. Remand for Immediate Award of Benefits

When a court finds that the ALJ committed harmful error, the court may modify or reverse the Commissioner's decision "'with or without remanding the case for a rehearing.'" *Garrison,* 759 F.3d at 1019 (quoting 42 U.S.C. § 405(g)). To determine whether to remand for further proceedings or an immediate award of benefits, the Ninth Circuit uses "a three-part credit-as-true standard, each part of which must be satisfied in order for a court to remand to an ALJ with instructions to calculate and award benefits." *Id.* at 1020. The court first determines whether the "'ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion.'" *Treichler v. Comm'r*, 775 F.3d 1090, 1100-01 (9th Cir. 2014) (quoting *Garrison*, 759 F.3d at 1020). Second, if the ALJ has erred, the court should determine whether the record has been fully developed, whether outstanding issues must be resolved before determining disability, and whether further administrative hearings would be useful. *Id.* at 1101. Third, if the court concludes "that no outstanding issues remain and further proceedings would not be useful," the court may "find the relevant testimony credible as a matter of law" and "determine whether the record, taken as a whole, leaves not the slightest uncertainty as to the outcome of the proceeding." *Id.* (citations, quotation marks, and brackets omitted). Even if a plaintiff satisfies the three-part test, the court retains discretion to remand for further

proceedings if the record as a whole creates "serious doubt as to whether the claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1021.

Here, Plaintiff meets the first requirement of the credit-as-true test. As explained above, the ALJ made harmful legal errors when he failed to provide legally sufficient reasons for discounting Plaintiff's subjective symptom testimony and the medical opinion of Dr. Powell.

Plaintiff meets the test's second requirement. The record here has been fully developed.

Plaintiff also meets the test's third requirement. If the improperly discredited evidence is credited as true, the ALJ would be compelled to find that Plaintiff is disabled. I therefore remand for an immediate calculation and award of benefits.

CONCLUSION

Pursuant to sentence four of 42 U.S.C. § 405(g), the decision of the Commissioner is REVERSED and REMANDED for an immediate calculation and award of benefits.

IT IS SO ORDERED.

DATED October 10th, 2019.

Robert E. Jones
United States District Judge