IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SABRINA B.,[1]

Plaintiff,

v.

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant.

Civil No. 6:20-cv-01791-MC

OPINION AND ORDER

McShane, Judge:

Plaintiff Sabrina B. seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying her application for supplemental security income ("SSI") under Title II of the Social Security Act. This Court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3). Plaintiff alleges that the Administrative Law Judge ("ALJ") erred by (1) rejecting the medical opinion of Dr. Gregory Cole, Ph.D.; (2) discrediting Plaintiff's subjective symptom testimony; and (3) rejecting lay witness testimony without discussion. Pl.'s Br. 5-15, ECF No. 15. Because the ALJ committed harmful legal error in discrediting Plaintiff's symptom testimony and failing to consider lay witness testimony, this case is REVERSED AND REMANDED for further proceedings.

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

PROCEDURAL BACKGROUND

Plaintiff applied for SSI on June 14, 2018, alleging disability since February 1, 1999. Tr. 146–53. Her claim was denied initially and upon reconsideration. Tr. 67–80, 85–87. Plaintiff appeared before the Honorable Katherine Weatherly on February 18, 2020, and Plaintiff amended her alleged onset date to June 14, 2018. Tr. 26–47. ALJ Weatherly denied Plaintiff's claim on March 19, 2020. Tr. 10–23. Plaintiff sought review from the Appeals Council and was denied on August 20, 2020, rendering the ALJ's decision final. Tr. 1–3. Plaintiff now seeks judicial review of the ALJ's decision.

Plaintiff is 52 years old and was 48 years old on her amended alleged onset date. *See* Tr. 146. Plaintiff has at least a high school education and has no past relevant work experience. Tr. 19. Plaintiff alleges disability from post-traumatic stress disorder ("PTSD"). Tr. 180.

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. *See* 42 U.S.C. § 405(g); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Ahearn v. Saul*, 988 F.3d 1111, 1115 (9th Cir. 2021) (reaffirming the substantial evidence standard in social security cases). "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, the court reviews 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) (citing *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986)).

"'If the evidence can reasonably support either affirming or reversing,' the reviewing court 'may not substitute its judgment' for that of the Commissioner." *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 uses a five-step sequential evaluation to determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4) (2012). The burden of proof rests on the claimant for steps one through four and on the Commissioner for step five. *Bustamante v. Massanari*, 262 F.3d 949, 953–54 (9th Cir. 2001) (citing *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999)). At step five, the Commissioner's burden is to demonstrate that the claimant can make an adjustment to other work existing in significant numbers in the national economy after considering the claimant's residual functional capacity, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). The Commissioner may satisfy this burden by referring to the Medical-Vocational Guidelines ("Grids") or by obtaining testimony from a VE. *Tackett*, 180 F.3d at 1100–01. If the Commissioner fails to meet its burden, then the claimant is considered disabled. *Id.*

Plaintiff argues that the ALJ erred in three ways: (1) rejecting Dr. Cole's medical opinion; (2) rejecting Plaintiff's subjective symptom testimony; and (3) rejecting a lay witness statement from Plaintiff's caseworker without discussion.

I. Dr. Cole's Medical Opinion

Plaintiff argues that the ALJ erred in her assessment of Dr. Cole's medical opinion. Plaintiff's claim, which was filed in 2018, was filed on or after March 27, 2017, so the new regulations for evaluating medical opinion evidence apply. *See Revisions to Rules Regarding the*

Evaluation of Medical Evidence ("*Revisions to Rules*"), 2017 WL 168819, 82 Fed. Reg. 5844-01, at *5867-68 (Jan. 18, 2017). Under the new regulations, the ALJ is no longer required to "defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s)." 20 C.F.R. § 404.1520c(a). Instead, the ALJ must consider all the medical opinions in the record and evaluate each medical opinion's persuasiveness using factors. *Id.* The two most important factors in determining a medical opinion's persuasiveness are the opinion's "supportability" and "consistency." 20 C.F.R. §§ 404.1520c(a), 416.920c(a). The ALJ must articulate "how [he or she] considered the supportability and consistency factors for a medical source's medical opinions . . . in [his or her] decision." 20 C.F.R. §§ 404.1520c(b)(2), 416.1520c(b)(2).

With regard to supportability, the "more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinion(s), the more persuasive the medical opinions . . . will be." 20 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1). As to consistency, the "more consistent a medical opinion(s) is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion(s) . . . will be." 20 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2). The ALJ is not required to explain how she considered other factors unless the ALJ finds that two or more medical opinions about the same issue are equally well-supported and consistent with the record but not identical. *See* 20 C.F.R. §§ 404.1520c(b)(3), 416.1520c(b)(3).

Dr. Cole performed a consultative psychological evaluation of Plaintiff in November 2019. Tr. 386-94. The results of the evaluation indicated that Plaintiff exhibited some attention and concentration problems and that Plaintiff could benefit from follow-up psychological services and behavioral medication management. Tr. 389. Dr. Cole further noted that Plaintiff had average immediate memory ability, above average delayed memory ability, and no problems

completing simple multiple-skep tasks. Tr. 389. Ultimately, Dr. Cole noted that Plaintiff had marked limitations in the ability to interact appropriately with co-workers and supervisors and respond appropriately to work situations and to changes in a routine work setting. Tr. 392–93.

The ALJ found Dr. Cole's opinion concerning Plaintiff's marked limitations unpersuasive. Tr. 19. The ALJ reasoned that those marked limitations were inconsistent with Dr. Cole's own findings as well as unsupported by other evidence in Plaintiff's longitudinal records. Tr. 19.

Plaintiff argues that the ALJ erred in evaluating the supportability and consistency of Dr. Cole's opinion. Pl.'s Br. 8-9. In particular, Plaintiff asserts that Dr. Cole's opinion was entirely consistent his own examination reports and Plaintiff's overall treatment record. *Id.*

The ALJ appropriately considered the supportability and consistency of Dr. Cole's medical opinion. The ALJ first determined that Dr. Cole's opinion was not supported by his own findings. Incongruity between a doctor's opinion and his own treatment notes provides a valid basis for an ALJ to discount a medical opinion. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Here, despite Dr. Cole's assessment that Plaintiff had marked limitations in the ability to interact with coworkers and supervisors and in responding appropriate to work settings, Tr. 392-93, Dr. Cole's treatment notes also reported that Plaintiff demonstrated a good mood with congruent affect; Plaintiff's attitude was engaged and cooperative; and Plaintiff reported to Dr. Cole that she can use public transportation, go shopping, see friends three times per month, and go for walks. Tr. 389. The ALJ further reasoned that Dr. Cole's opinion was inconsistent with other evidence in the record that consistently demonstrated that Plaintiff was sociable with a positive mood and effect. Tr. 19 (citing generally Tr. 289-379, 408-460); *see also* Tr. 281, 283, 293, 295. The ALJ therefore did not err in finding Dr. Cole's opinion unpersuasive.

II. Plaintiff's Subjective Symptom Testimony

Plaintiff argues that the ALJ erred by improperly discrediting Plaintiff's subjective symptom testimony. An ALJ must consider a claimant's symptom testimony, including statements regarding pain and workplace limitations. *See* 20 CFR §§ 404.1529(a), 416.929(a) (2017). Where there is objective medical evidence in the record of an underlying impairment that could reasonably be expected to produce the pain or symptoms alleged and there is no affirmative evidence of malingering, the ALJ must provide clear and convincing reasons for discrediting the claimant's testimony regarding the severity of his symptoms. *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The ALJ is not "required to believe every allegation of disabling pain, or else disability benefits would be available for the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

The ALJ "may consider a range of factors in assessing credibility." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014). These factors can include "ordinary techniques of credibility evaluation," *id.*, as well as:

> (1) whether the claimant engages in daily activities inconsistent with the alleged symptoms; (2) whether the claimant takes medication or undergoes other treatment for the symptoms; (3) whether the claimant fails to follow, without adequate explanation, a prescribed course of treatment; and (4) whether the alleged symptoms are consistent with the medical evidence.

Lingenfelter, 504 F.3d at 1040. It is proper for the ALJ to consider the objective medical evidence in making a credibility determination. 20 C.F.R. §§ 404.1529(c)(2); 416.929(c)(2). However, an ALJ may not make a negative credibility finding "solely because" the claimant's symptom testimony "is not substantiated affirmatively by objective medical evidence." *Robbins*

v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006). The Ninth Circuit has upheld negative credibility findings, however, when the claimant's statements at the hearing "do not comport with objective evidence in her medical record." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). If finding a lack of credibility, the ALJ is "required to point to specific facts in the record" to support that finding. *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2021) (citing *Vazquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2009)).

Plaintiff alleged that her physical and mental health concerns kept her from working. At the hearing, Plaintiff testified that she is unable to work because of flashbacks, anxiety, and difficulty concentrating and understanding. Tr. 32. She also testified that she has difficulty standing and walking for long periods of time. Tr. 32. Further, she indicated that she sometimes has difficulty working with others due to a lack of patience and anger issues. Tr. 37–38.

In rejecting Plaintiff's subjective symptom testimony, the ALJ first noted that "the claimant's statements concerning the intensity, persistency, and limiting effects of [her] symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this decision." Tr. 17. The ALJ then summarized medical evidence, and—without mentioning any of Plaintiff's testimony—found that the medical evidence did not warrant functional limitations beyond Plaintiff's RFC. Tr. 18-19. Later, after reciting Plaintiff's testimony, the ALJ concluded that "[o]verall, the claimant's testimony is not persuasive in establishing disability or even a need for additional functional limitations" because "the RFC already limits the claimant to simple, routine, repetitive tasks with few, if any, changes and no more than occasional contact with the public or supervisors, no direct coworker contact, and no teamwork tasks, and the RFC "also accounts for her lapses in concentration." Tr. 19.

Here, the ALJ failed to provide sufficient reasoning in finding Plaintiff's testimony unpersuasive. The ALJ's initial "introductory remark"—that Plaintiff's statements were not consistent with the objective medical evidence and other evidence for the reasons explained in the decision—constituted a "boilerplate statement" that is "routinely included in ALJ decisions denying benefits, and [the ALJ] did not identify which parts of the claimant's testimony were not credible and why." *Lambert v. Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020)

The ALJ's brief summary of the medical record also did not constitute sufficiently specific reasons rejecting Plaintiff's testimony. Although the ALJ provided a relatively detailed overview of the relevant medical evidence, "providing a summary of medical evidence . . . is not the same as providing clear and convincing *reasons* for finding the claimant's symptom testimony not credible." *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015) (emphasis in original). In fact, the ALJ never mentioned Plaintiff's symptom testimony while discussing the relevant medical evidence. *See* Tr. 18-19. In finding Plaintiff's testimony inconsistent with the medical record, the ALJ "simply stated her non-credibility conclusion and then summarized the medical evidence supporting her RFC determination. This is not the sort of explanation or the kind of 'specific reasons'" that permits a meaningful review of the ALJ's decision to ensure that Plaintiff's testimony was not arbitrarily discredited. *Brown-Hunter*, 806 F.3d at 494.

Further, the ALJ's subsequent brief discussion of Plaintiff's symptom testimony, followed by the finding that the testimony was not credible because Plaintiff's RFC accounted for her limitations, was likewise insufficient. The Ninth Circuit has repeatedly held that an ALJ commits legal error in making a "'general statement that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment,' without identifying

'sufficiently specific reasons' for rejecting the testimony, supported by evidence in the case record." *Brown-Hunter*, 806 F.3d at 493 (quoting *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102–03 (9th Cir. 2014)).

The ALJ here only relied on Plaintiff's RFC to reject portions of her symptom testimony; the ALJ did not "point to specific facts in the record" to support her finding. *See Burrell v. Colvin*, 775 F.3d at 1138. The ALJ "'never explained *which* evidence contradicted that testimony.'" *Lambert*, 980 F.3d at 1277 (quoting *Brown-Hunter*, 806 F.3d at 494 (emphasis in original)). Moreover, it is inconsequential that the ALJ provided an earlier summary of the relevant medical evidence before reciting Plaintiff's symptom testimony: it was legal error for the ALJ to "not link that testimony to the particular parts of the record supporting her non-credibility determination." *Brown-Hunter v. Colvin*, 494 (9th Cir. 2015). Thus, the ALJ committed legal error in discrediting Plaintiff's subjective symptom testimony.

Nor was the ALJ's error harmless. An error is harmless when it is inconsequential to the ultimate non-disability decision. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). The Ninth Circuit has held that, when an ALJ commits legal error in failing to specify her reasons for finding claimant testimony not credible, "such error will usually not be harmless," given that the Court "cannot engage in such substitution or speculation." *Brown-Hunter v. Colvin*, at 492. As such, the ALJ committed harmful legal error in failing to provide specific reasons for rejecting Plaintiff's testimony.

III. Lay Witness Testimony

In addition to Plaintiff's own subjective allegations, Plaintiff's caseworker also submitted statements in support of Plaintiff's disability. Tr. 215–20. Plaintiff argues that the ALJ erred by failing to consider this lay witness testimony. Pl.'s Br. 14–15. Competent lay witness testimony

"*cannot* be disregarded without comment." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (emphasis in original). Typically, an ALJ must provide "germane reasons" for rejecting lay testimony. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).

Here, the ALJ committed legal error in disregarding Plaintiff's caseworker's statements without comment. The ALJ also failed to make specific findings or provide germane reasons to discredit Plaintiff's caseworker's lay witness testimony. In response, the Commissioner argues that the ALJ did not commit legal error because 20 C.F.R. § 404.1520c(d) does not require ALJs to articulate how they consider nonmedical source statements. Def.'s Br. 8, ECF No. 19. The Commissioner is mistaken: "Although § 404.1520c(d) states the Commissioner is 'not required to articulate how we consider evidence from nonmedical sources' using the same criteria for medical sources, it does not eliminate the need for the ALJ to articulate his consideration of lay-witness statements and his reasons for discounting those statements." *Joseph M. R. v. Comm'r of Soc. Sec.*, 3:18-CV-01779-BR, 2019 WL 4279027, at *12 (D. Or. Sept. 10, 2019) (quoting 20 C.F.R. § 404.1520C(d)). Thus, the ALJ's failure to consider the caseworker's lay witness statement constituted harmful legal error.

IV. Remand

Plaintiff argues that in light of the ALJ's error, her testimony should be credited as true. Pl.'s Br. 14, 15. As the ALJ erred, the question is whether to remand for further administrative proceedings or an award of benefits.

Generally, "when an ALJ's denial of benefits is not supported by the record, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012), quoting *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). However, an award of benefits can be directed "where the

record has been fully developed and where further administrative proceedings would serve no useful purpose." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Remand for calculation of benefits is only appropriate where the credit-as-true standard has been satisfied, which requires:

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

Garrison, 759 F.3d at 1020 (citations omitted).

In this instance, a remand for further proceedings is appropriate. As discussed above, the ALJ did not provide legally sufficient reasons for rejecting Plaintiff's subjective symptom testimony. "If the ALJ fails to specify his or her reasons for finding claimant testimony not credible, a reviewing court will be unable to review those reasons meaningfully without improperly 'substitut[ing] our conclusions for the ALJ's, or speculat[ing] as to the grounds for the ALJ's conclusions.'" *Brown-Hunter*, 806 F.3d at 492 (internal citation omitted). Additionally, the ALJ improperly rejected Plaintiff's caseworker's lay witness testimony without discussion. This Court cannot speculate what the ALJ's factual findings would be on remand, and it cannot substitute its own conclusions for the ALJ's. *See Treichler*, 775 F.3d at 1100; *see See Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) ("[T]he decision on disability rests with the ALJ and the Commissioner of the Social Security Administration in the first instance, not with a district court."). Further administrative proceedings would serve a useful purpose here.

Accordingly, this case is remanded for further proceedings. On remand, the ALJ shall (1) provide reasons based on specific evidence in the record in determining the credibility of

Plaintiff's symptom testimony, and (2) make a factual finding in the first instance concerning the relevant lay witness testimony.

CONCLUSION

For these reasons, the Commissioner's final decision is REVERSED AND REMANDED for further proceedings consistent with this decision.

IT IS SO ORDERED.

DATED this 3rd day of August, 2022.

__s/Michael J. McShane____
Michael J. McShane
United States District Judge