

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 17, 2017

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

VICTORIYONDO JESSE MORALES,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL

SECURITY,

Defendant.

No. 1:15-cv-03203-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 19, 20

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 19, 20. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion (ECF No. 19) and denies Defendant's motion (ECF No. 20).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 **STANDARD OF REVIEW**

2 A district court’s review of a final decision of the Commissioner of Social
3 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
4 limited; the Commissioner’s decision will be disturbed “only if it is not supported
5 by substantial evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153,
6 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
7 reasonable mind might accept as adequate to support a conclusion.” Id. at 1159
8 (quotation and citation omitted). Stated differently, substantial evidence equates to
9 “more than a mere scintilla[,] but less than a preponderance.” Id. (quotation and
10 citation omitted). In determining whether the standard has been satisfied, a
11 reviewing court must consider the entire record as a whole rather than searching
12 for supporting evidence in isolation. Id.

13 In reviewing a denial of benefits, a district court may not substitute its
14 judgment for that of the Commissioner. If the evidence in the record “is
15 susceptible to more than one rational interpretation, [the court] must uphold the
16 ALJ’s findings if they are supported by inferences reasonably drawn from the
17 record.” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
18 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
19 Id. An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
20 nondisability determination.” Id. at 1115 (quotation and citation omitted). The

1 party appealing the ALJ's decision generally bears the burden of establishing that
2 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-410 (2009).

3 **FIVE-STEP EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within
5 the meaning of the Social Security Act. First, the claimant must be "unable to
6 engage in any substantial gainful activity by reason of any medically determinable
7 physical or mental impairment which can be expected to result in death or which
8 has lasted or can be expected to last for a continuous period of not less than twelve
9 months." 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant's
10 impairment must be "of such severity that he is not only unable to do his previous
11 work[,] but cannot, considering his age, education, and work experience, engage in
12 any other kind of substantial gainful work which exists in the national economy."
13 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§
16 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
17 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
18 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(b); 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
4 claimant suffers from "any impairment or combination of impairments which
5 significantly limits [his or her] physical or mental ability to do basic work
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
9 §§ 404.1520(c); 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to
11 severe impairments recognized by the Commissioner to be so severe as to preclude
12 a person from engaging in substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
14 severe than one of the enumerated impairments, the Commissioner must find the
15 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
6 If the claimant is capable of performing past relevant work, the Commissioner
7 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
8 If the claimant is incapable of performing such work, the analysis proceeds to step
9 five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing other work in the national economy.
12 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
13 the Commissioner must also consider vocational factors such as the claimant's age,
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
15 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
17 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
18 work, analysis concludes with a finding that the claimant is disabled and is
19 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
6 Beltran v. Astrue, 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 Plaintiff filed for Title II disability insurance benefits on October 22, 2009
9 and Title XVI supplemental security income benefits on November 9, 2009. Tr.
10 356-64. He alleged a disability onset date of October 31, 2008 in both petitions.
11 Id. The applications were denied initially and upon reconsideration. Tr. 166-72,
12 174-85. Plaintiff appeared at a hearing before an Administrative Law Judge (ALJ)
13 on December 8, 2011. Tr. 76-102. A supplemental hearing was held on May 1,
14 2012. Tr. 41-75. On June 14, 2012, the ALJ denied Plaintiff’s claim. Tr. 137-59.
15 The Appeals Council remanded the decision and directed the ALJ to further
16 consider the opinion of Dr. Genthe. Tr. 160-63. Plaintiff appeared for another
17 hearing before the ALJ on January 28, 2014. Tr. 103-31. The ALJ denied his
18 claim on March 3, 2014. Tr. 15-40.

1 At the outset, the ALJ determined that Plaintiff's date last insured was
2 December 31, 2008.¹ Tr. 21. At step one, the ALJ found that Plaintiff has not
3 engaged in substantial gainful activity since October 31, 2008. Tr. 21. At step
4 two, the ALJ found Plaintiff has the following severe impairments: major
5 depressive disorder, panic disorder, post-traumatic stress disorder, cognitive
6 disorder, personality disorder, and alcohol abuse. Tr. 21. At step three, the ALJ
7 found that Plaintiff does not have an impairment or combination of impairments
8 that meets or medically equals a listed impairment. Tr. 22. The ALJ then
9 concluded that Plaintiff has the RFC to perform a full range of work at all
10 exertional levels with the following nonexertional limitations:

11 The claimant cannot climb ladders, ropes or scaffolds. He is limited to only
12 occasional exposure to hazardous conditions such as proximity to
13 unprotected heights and moving machinery. He is limited to tasks that can be
14 learned in 30 days or less involving no more than simple work-related
decisions and few workplace changes. He is limited to superficial interaction
with both the public and with co-workers. He would not perform well as a
member of a highly interactive or interdependent work group.

15 Tr. 23. At step four, the ALJ found that Plaintiff is not capable of performing past
16 relevant work. Tr. 30. The ALJ determined at step five that there are jobs that

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18 ¹ In order to obtain disability benefits, Plaintiff must demonstrate that he was
19 disabled prior to his last insured date. See 42 U.S.C. § 423(c); 20 C.F.R.
20 § 404.1520.

1 exist in significant numbers in the national economy that the Plaintiff can perform
2 given his age, education, work experience, and residual functional capacity such as
3 assembler production, cleaner, housekeeper, and mail clerk. Tr. 31. On that basis,
4 the ALJ concluded that Plaintiff was not disabled as defined in the Social Security
5 Act. Tr. 32.

6 On September 24, 2015, the Appeals Council denied review, Tr. 1-4, making
7 the Commissioner's decision final for purposes of judicial review. See 42 U.S.C.
8 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 him supplemental security income benefits under Title XVI and disability
12 insurance benefits under Title II of the Social Security Act. ECF No. 19. Plaintiff
13 raises the following issues for this Court's review:

- 14 1. Whether the ALJ properly weighed the medical opinion evidence; and
- 15 2. Whether the ALJ properly discounted Plaintiff's symptom claims.

16 ECF No. 19 at 7-19.

17 DISCUSSION

18 A. Medical Opinion Evidence

19 Plaintiff faults the ALJ for discounting the medical opinions of Stephen
20 Rubin, Ph.D. and Thomas Genthe, Ph.D.; crediting the opinion of Thomas

1 McNight, Ph.D.; and not considering the opinion of Tae-Im Moon, Ph.D. ECF No.
2 19 at 7-16.

3 There are three types of physicians: “(1) those who treat the claimant
4 (treating physicians); (2) those who examine but do not treat the claimant
5 (examining physicians); and (3) those who neither examine nor treat the claimant
6 but who review the claimant’s file (nonexamining or reviewing physicians).”

7 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).

8 “Generally, a treating physician’s opinion carries more weight than an examining
9 physician’s, and an examining physician’s opinion carries more weight than a
10 reviewing physician’s.” *Id.* “In addition, the regulations give more weight to
11 opinions that are explained than to those that are not, and to the opinions of
12 specialists concerning matters relating to their specialty over that of
13 nonspecialists.” *Id.* (citations omitted).

14 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
15 reject it only by offering “clear and convincing reasons that are supported by
16 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

17 “However, the ALJ need not accept the opinion of any physician, including a
18 treating physician, if that opinion is brief, conclusory and inadequately supported
19 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
20 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or

1 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
2 may only reject it by providing specific and legitimate reasons that are supported
3 by substantial evidence.” Bayliss, 427 F.3d at 1216 (citing Lester v. Chater, 81
4 F.3d 821, 830-31 (9th Cir. 1995)).

5 The opinion of an acceptable medical source such as a physician or
6 psychologist is given more weight than that of an “other source.” See SSR 06-03p
7 (Aug. 9, 2006), available at 2006 WL 2329939 at *2; 20 C.F.R. § 416.927(a).

8 “Other sources” include nurse practitioners, physician assistants, therapists,
9 teachers, social workers, and other non-medical sources. 20 C.F.R. §§

10 404.1513(d), 416.913(d). The ALJ need only provide “germane reasons” for
11 disregarding an “other source” opinion. Molina, 674 F.3d at 1111. However, the
12 ALJ is required to “consider observations by nonmedical sources as to how an
13 impairment affects a claimant’s ability to work.” Sprague v. Bowen, 812 F.2d
14 1226, 1232 (9th Cir. 1987).

15 1. Dr. Rubin

16 Dr. Rubin reviewed Plaintiff’s medical record and testified at the
17 supplemental hearing on May 1, 2012. Tr. 47-57. He opined that Plaintiff had
18 major depressive disorder, mild; PTSD; and personality disorder absent substance
19 abuse. Tr. 27 (citing Tr. 50-51). He opined that Plaintiff would have a marked
20 problem in his ability to accept instructions and respond appropriately to criticism

1 from supervisors. Tr. 53. The ALJ afforded Dr. Rubin’s opinion “significant
2 weight.” Tr. 27.

3 Plaintiff contends that the ALJ erred, first by misstating part of Dr. Rubin’s
4 opinions regarding an assessed limitation, and further by failing to incorporate the
5 limitation into the RFC. ECF No. 19 at 13. Specifically, Dr. Rubin opined that
6 Plaintiff would have a marked problem in his ability to accept instructions and
7 respond appropriately to criticism from supervisors. Tr. 53. However, the ALJ
8 stated in the decision that Dr. Rubin opined a moderate problem in this area.
9 Tr. 27. A moderate restriction is less severe than a marked restriction. Plaintiff’s
10 RFC restricted him to “superficial interaction with both the public and with
11 coworkers. He would not perform well as a member of highly interactive or
12 interdependent work group.” Tr. 23. The RFC did not include any limitations
13 relating to Plaintiff’s interactions with supervisors, despite the fact the ALJ fully
14 credited Dr. Rubin’s opinions.

15 Defendant argues that a misstated limitation is harmless error so long as
16 substantial evidence supports the ALJ’s RFC. ECF No. 20 at 8 (citing *Bason v.*
17 *Comm’r of Soc. Sec. Admin.*, 475 F. App’x 217, 219 (9th Cir. 2012) (unpublished)
18 (finding no reversible error where the ALJ misquoted a physician’s finding but the
19 record “overwhelmingly” supported the ALJ’s RFC)). This case is distinguished
20 from *Bason* because here the RFC did not incorporate either the underlying or the

1 misstated limitation. *Bason*, 475 F. App'x at 219 (The ALJ misstated a limitation
2 that Plaintiff could stand for less than six hours in a workday by omitting the word
3 less. The assessed RFC, based on “overwhelming” evidence in the record, limited
4 Plaintiff to light work, which is consistent with the underlying and the misstated
5 limitations). Here, the opined limitation and the misstated limitation were entirely
6 omitted from the RFC.

7 Thus, the ALJ erred by failing to include in the RFC, without explanation, a
8 limitation identified by Dr. Rubin, whose opinion the ALJ fully credited. Tr. 53.
9 This error cannot be considered harmless. See *Molina*, 674 F.3d at 1115 (an error
10 is harmless only when it is “inconsequential to the [ALJ’s] ultimate nondisability
11 determination”). Kimberly Mullinax, the vocational expert at the January 28, 2014
12 hearing testified that “the [Plaintiff] would need to work cooperatively with the
13 supervisor and respond appropriately to instructions, so if they had no ability to do
14 that, to respond to supervisors appropriately, then they would not be able to
15 maintain employment.” Tr. 27 (citing Tr. 130). The medical expert at the hearing
16 on May 1, 2012, Dr. Rubin, testified that “the major issue is the relationship with
17 supervisors, and his relationship with coworkers and the public certainly is of
18 concern. It speaks at the question whether Mr. Morales at 27 can make a change in
19 the way he could function, and I don’t know about that.” Tr. 54.

1 Remand for further proceedings is appropriate because the ALJ gave “great
2 weight” to Dr. Dougherty’s opinion which did not assess any limitations with
3 regards to Plaintiff’s ability to work with supervisors. Tr. 28 (citing Tr. 585-86).
4 Given the inconsistency regarding this limitation between the medical opinions of
5 Dr. Rubin and Dr. Dougherty, both of which the ALJ credited, he must address the
6 conflict in the first instance. Thus, on remand, the ALJ must reconsider the
7 medical evidence, reassess the RFC, and if necessary, reconsider the hypothetical
8 posed to the vocational expert to ensure it properly includes all of the Plaintiff’s
9 limitations supported by substantial evidence. See *Osenbrock v. Apfel*, 240 F.3d
10 1157, 1165 (9th Cir. 2001) (“[a]n ALJ is free to accept or reject restrictions in a
11 hypothetical question that are not supported by substantial evidence.”).

12 Next, Plaintiff argues that the ALJ erred because “contrary to Dr. Rubin’s
13 opinion, the ALJ gave little weight to the GAF scores in the record.” ECF No. 19
14 at 14 (citing Tr. 29). Clinicians use a GAF to rate the psychological, social, and
15 occupational functioning of a patient. The scale does not evaluate impairments
16 caused by psychological or environmental factors. *Morgan v. Comm'r of Soc. Sec.*
17 *Admin.*, 169 F.3d 595, 598 (9th Cir. 1999). The Commissioner has explicitly
18 disavowed use of GAF scores as indicators of disability. “The GAF scale . . . does
19 not have a direct correlation to the severity requirements in our mental disorder
20 listing.” 65 Fed. Reg. 50746-01, 50765 (August 21, 2000). Moreover, the GAF

1 scale is no longer included in the DSM–V.² Dr. Rubin opined that Plaintiff’s GAF
2 scores between 49 and 52 indicated “difficulty sustaining relationships, sustaining
3 employment, staying out of trouble.” Tr. 52. The ALJ discounted Plaintiff’s GAF
4 scores for two reasons. First, GAF scores “may have been based on an
5 individual’s self-reported symptomatology.” Tr. 29. The ALJ properly discounted
6 Plaintiff’s symptom testimony, as discussed infra. Second, the ALJ found that “a
7 low GAF score might reflect difficulties in a wide range functional areas,” while
8 “disability focuses on occupational functioning.” Tr. 29. The ALJ properly
9 discounted in the Plaintiff’s GAF scores in determining the Plaintiff’s RFC; no
10 error occurred.

11 2. Dr. Genthe

12 Dr. Genthe, a licensed psychologist, performed a consultative examination
13 on Plaintiff on February 2, 2012. Tr. 878-89. Dr. Genthe diagnosed Plaintiff with
14 major depressive disorder, chronic; panic disorder with agoraphobia; PTSD;

15
16 ² “It was recommended that the GAF be dropped from the DSM-5 for several
17 reasons, including its conceptual lack of clarity (i.e., including symptoms, suicide
18 risk, and disabilities in its descriptors) and questionable psychometrics in routine
19 practice.” DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5TH Ed.
20 at 16.

1 cognitive disorder, not otherwise specified, cocaine dependence, in full-sustained
2 (sic) remission; alcohol dependence, in full-sustained remission; (by history)
3 cannabis abuse/dependence in full-sustained (sic) remission; and adult antisocial
4 behaviors. *Id.* Dr. Genthe opined that Plaintiff's anxiety was managed mildly to
5 moderately well with medication; but that his depression was not managed
6 effectively with medication. Tr. 889. Dr. Genthe also completed a medical source
7 statement form on February 28, 2012, in which he opined that Plaintiff had
8 moderate restrictions in his ability to understand and remember simple
9 instructions; the ability to make judgments on simple work-related decisions;
10 understand and remember complex instructions; and respond appropriately to usual
11 work situations and to changes in a routine work setting. Tr. 891-93. He also
12 opined that Plaintiff had marked restrictions in his ability to understand and
13 remember complex instructions; carry out complex instructions; the ability to make
14 judgments on complex work-related decisions; interact appropriately with the
15 public and interact appropriately with co-workers. *Id.* The medical source
16 statement form included extreme restrictions in interacting appropriately with
17 supervisors. Tr. 892. The ALJ gave Dr. Genthe's opinions little weight. Tr. 29.

18 Because Dr. Genthe's opinion was controverted by Dr. McKnight, Tr. 82-93,
19 the ALJ must provide specific and legitimate reasons to reject it. *Bayliss*, 427 F.3d
20 at 1216.

1 First, the ALJ discounted Dr. Genthe's opinions because he engaged in a
2 limited record review; particularly, he reviewed out-of-date records. Tr. 29. The
3 extent to which a medical source is 'familiar with the other information in [the
4 claimant's] case record' is relevant in assessing the weight of that source's medical
5 opinion, see 20 C.F.R. §§ 404.1527(c)(6); 416.927(c)(6); however, it is but one
6 factor the ALJ can consider in weighing a medical opinion. See 20 C.F.R. §§
7 404.1527(c), 416.927(c); see also *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).
8 Here, Dr. Genthe's February 2, 2012 report included a section titled "review of
9 records[.]" Tr. 878. In it, Dr. Genthe listed two records that he reviewed: a
10 psychological evaluation for DSHS provided by Dick Moen dated February 6,
11 2009 and a psychological evaluation performed by Dr. Dougherty dated April 23,
12 2009. *Id.* Both of these records were three years old at the time of Dr. Genthe's
13 examination. Dr. Genthe's February 28, 2012 report did not indicate that he
14 reviewed any records in preparing the report. The ALJ noted that Dr. Genthe's
15 record review was incomplete, and that later records would "shed more objective
16 light on the claimant's treatment, lack of treatment, and alcohol abuse." Tr. 29.
17 The record supports the ALJ's conclusion that Dr. Genthe did not review more
18 recent records that tended to indicate alcohol abuse and other issues which may
19 have impacted his ultimate conclusion if considered. While it cannot be the only
20 reason to reject a medical opinion, the ALJ's finding that Dr. Genthe did not

1 appropriately review Plaintiff's medical records is a specific and legitimate reason
2 to discount his opinion. Bayliss, 427 F.3d at 1216.

3 Second, the ALJ afforded Dr. Genthe's opinion little weight because he
4 credited Plaintiff's statements regarding sobriety that the ALJ determined were
5 false. Tr. 29. Medical evidence may be discounted based on drug or alcohol use
6 affecting the opinion. See Morgan, 169 F.3d at 603; Andrew v. Shalala, 53 F.3d
7 1035, 1042-43 (9th Cir. 1995) (affirming an ALJ's dismissal of medical evidence
8 because the provider credited false statements from the Plaintiff that his addiction
9 was well controlled). Here, Dr. Genthe credited as true Plaintiff's statements that
10 he had been abstinent from alcohol for two years. Tr. 880. Nowhere in Dr.
11 Genthe's report did he indicate that he questioned Plaintiff's claim of total
12 abstinence. See Tr. 878-89. However, when Plaintiff presented to Nurse Hennessy
13 on January 18, 2012 regarding insomnia, she noted that "patient has the following
14 risk factors for insomnia: use of alcohol." Tr. 919. This medical evidence directly
15 contradicts the Plaintiff's statements regarding alcohol to Dr. Genthe. The ALJ
16 also found evidence of drinking from several months after Dr. Genthe's
17 examination indicative that Plaintiff likely was not candid with Dr. Genthe
18 regarding his alcohol use. Tr. 26. In July 2012, Plaintiff presented to the
19 emergency room with an injured hand; his provider reported that he "[w]as
20 drinking and does not recall [the] incident well." Tr. 931. The fact that Dr.

1 Genthe's relied on inaccurate information related to alcohol abuse is a specific and
2 legitimate reason to discount Dr. Genthe's medical opinion.

3 Third, the ALJ did not afford weight to Dr. Genthe's opinions because of the
4 tension between his examination notes and his medical source statement. Tr. 29.

5 A medical opinion may be rejected by the ALJ if it is conclusory, contains
6 inconsistencies, or is inadequately supported. Bray, 554 F.3d at 1228; Thomas v.

7 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). Dr. Genthe's medical source

8 statement was based on the examination that he conducted on February 2, 2012. In

9 the medical source statement, he lists the WMS-IV results as the basis for his

10 opinion; he conducted the WMS-IV test during the February 2, 2012 examination.

11 The ALJ determined that the evidence in the first report was inconsistent with the

12 opined limitations listed in the medical source statement. Tr. 29. Dr. Genthe's

13 opined limitations in the medical source statement demonstrate a severe

14 impairment of Plaintiff's ability to work. Tr. 891-93. As detailed above, he noted

15 a marked restriction in five areas: his ability to understand and remember complex

16 instructions; carry out complex instructions; the ability to make judgments on

17 complex work-related decisions; interact appropriately with the public and interact

18 appropriately with co-workers. Id. A marked restriction is defined as a serious

19 limitation with "substantial loss in the ability to effectively function." Tr. 891. Dr.

20 Genthe further opined extreme restrictions in interacting appropriately with

1 supervisors. Tr. 892. However, many of Plaintiff's results from the underlying
2 examination were average, or just below average. For instance, his ability to
3 remember short, simple instructions was fair. Tr. 889. His ability to sustain an
4 ordinary routine without supervision was fair. Tr. 889. His ability to work with
5 others without being distracted by them was fair. Tr. 889. Dr. Genthe opined that
6 his anxiety was well-managed with medication. Tr. 889. Despite these results, Dr.
7 Genthe assessed tremendous limitations in Plaintiff's ability to work. The ALJ's
8 determination that Dr. Genthe's examination notes are inconsistent with his
9 medical source statement is a specific and legitimate reason to discount Dr.
10 Genthe's opinions. Bayliss, 427 F.3d at 1216.

11 Although the ALJ provided legally sufficient reasons for giving limited
12 weight to Dr. Genthe's opinion, given the Court's finding above, the ALJ on
13 remand must reconsider all the medical evidence.

14 3. Dr. McKnight

15 Dr. McKnight is a reviewing physician that testified at Plaintiff's first
16 hearing on December 8, 2011. Tr. 82-93. He opined that Plaintiff's mental health
17 impairments were not severe absent substance abuse. Tr. 27 (citing Tr. 87). Dr.
18 McKnight did not have the benefit of reviewing later medical evidence which
19 supported Plaintiff does have severe mental health impairments absent substance
20

1 abuse. Tr. 27. The ALJ afforded Dr. McKnight’s opinion “significant weight[.]”
2 Tr. 27.

3 Plaintiff contends that it was error for the ALJ to afford Dr. McKnight’s
4 opinion “significant weight” because “[t]he later opinions of Dr. Genthe and Dr.
5 Rubin, supported by evaluations done by treating mental health therapists,
6 demonstrate that [Plaintiff] does have severe mental illness.” ECF No. 19 at 15. It
7 is the role of the ALJ to resolve conflicts and ambiguity in the evidence. See
8 Morgan, 169 F.3d at 599-600; see also Sprague, 812 F.2d at 1229-30.
9 Furthermore, “[i]t is not necessary to agree with everything an expert witness says
10 in order to hold that his testimony contains ‘substantial evidence.’ ” Russell v.
11 Bowen, 856 F.2d 81, 83 (9th Cir. 1988) (citation omitted). Here, in considering Dr.
12 McKnight’s opinion, the ALJ noted that “additional evidence received after the
13 initial hearing indicates the claimant does have severe mental health impairments
14 absent substance abuse[.]” Tr. 27. The ALJ went on to conclude that “Dr.
15 McKnight’s testimony supports finding the claimant’s mental health impairments
16 are not disabling.” Tr. 27. Plaintiff requests the Court substitute its own
17 judgement in lieu of the ALJ’s. The ALJ did not err in considering Dr.
18 McKnight’s opinion because he acknowledged that Dr. McKnight did not have the
19 benefit of Plaintiff’s entire medical record and weighed the medical evidence
20

1 accordingly. However, on remand, the ALJ is required to reconsider all medical
2 evidence.

3 4. Dr. Moon

4 Dr. Moon is an examining psychologist. He examined Plaintiff on January
5 1, 2012 and opined that Plaintiff's "severe anxiety and depression interferes with
6 his ability to work." Tr. 926-29. He further opined that Plaintiff "is easily
7 overwhelmed, has difficulty remembering and following instructions." Tr. 928.
8 The ALJ did not specify how much weight he assigned Dr. Moon's opinion. See
9 Tr. 18-32.

10 Because Dr. Moon's opinion is contradicted by Dr. McKnight's, Tr. 82-93,
11 the ALJ must provide specific and legitimate reasons to reject it. Bayliss, 427 F.3d
12 at 1216.

13 Plaintiff contends that the ALJ did not specifically address Dr. Moon's
14 opinion, which was reversible error. ECF No. 19 at 16. The opinions of
15 examining physicians and psychologists must be considered by the ALJ. See 20
16 C.F.R. § 404.1527; Lester, 81 F.3d at 830. An ALJ is not required to say magic
17 words in rejecting a medical opinion. Magallanes v. Bowen, 881 F.2d 747, 755
18 (9th Cir. 1989) ("It is true that the ALJ did not recite the magic words, "I reject Dr.
19 Fox's opinion about the onset date because...." But our cases do not require such an
20 incantation. As a reviewing court, we are not deprived of our faculties for drawing

1 specific and legitimate inferences from the ALJ's opinion. It is proper for us to read
2 the paragraph discussing Dr. Pont's findings and opinion, and draw inferences
3 relevant to Dr. Fox's findings and opinion, if those inferences are there to be
4 drawn.”)

5 The ALJ did not evaluate Dr. Moon’s opinion. See Tr. 18-32. As this case
6 is being remanded, the ALJ is directed to specifically consider Dr. Moon’s opinion
7 on remand and provide legally sufficient reasons for the evaluation of the opinion.

8 **B. Adverse Credibility Finding**

9 Next, Plaintiff faults the ALJ for failing to provide specific findings with
10 clear and convincing reasons for discrediting his symptom claims. ECF No. 19 at
11 16-19.

12 An ALJ engages in a two-step analysis to determine whether a Plaintiff’s
13 testimony regarding subjective pain or symptoms is credible. “First, the ALJ must
14 determine whether there is objective medical evidence of an underlying
15 impairment which could reasonably be expected to produce the pain or other
16 symptom alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
17 “The claimant is not required to show that [his] impairment could reasonably be
18 expected to cause the severity of the symptom [he] has alleged; [he] need only
19 show that it could reasonably have caused some degree of the symptom.” *Vasquez*
20 *v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if she gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
5 citations and quotations omitted). “General findings are insufficient; rather, the
6 ALJ must identify what testimony is not credible and what evidence undermines
7 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas*, 278 F.3d
8 at 958 (“[T]he ALJ must make a credibility determination with findings
9 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily
10 discredit claimant’s testimony.”). “The clear and convincing [evidence] standard
11 is the most demanding required in Social Security cases.” *Garrison v. Colvin*, 759
12 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278
13 F.3d 920, 924 (9th Cir. 2002)).

14 In making an adverse credibility determination, the ALJ may consider, inter
15 alia, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
16 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
17 daily living activities; (4) the claimant’s work record; and (5) testimony from
18 physicians or third parties concerning the nature, severity, and effect of the
19 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

1 In discrediting Plaintiff's symptom claims, the ALJ found that the objective
2 medical evidence did not support the degree of physical or psychiatric limitation
3 alleged by Plaintiff. Tr. 24. Because the medical evidence was not properly
4 evaluated, on remand the ALJ should also reconsider the credibility finding.
5 Whether a proper evaluation of the medical opinions can be reconciled with the
6 ALJ's existing adverse credibility determination is for the Commissioner to decide
7 in the first instance.

8 **REMEDY**

9 The decision whether to remand for further proceedings or reverse and
10 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
11 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
12 where "no useful purpose would be served by further administrative proceedings,
13 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
14 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
15 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
16 (9th Cir. 1990). See also *Garrison*, 759 F.3d at 1021 (noting that a district court
17 may abuse its discretion not to remand for benefits when all of these conditions are
18 met). This policy is based on the "need to expedite disability claims." *Varney*,
19 859 F.2d at 1401. But where there are outstanding issues that must be resolved
20 before a determination can be made, and it is not clear from the record that the ALJ

1 would be required to find a claimant disabled if all the evidence were properly
2 evaluated, remand is appropriate. See *Benecke v. Barnhart*, 379 F.3d 587, 595-96
3 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

4 In this case, it is not clear from the record that the ALJ would be required to
5 find Plaintiff disabled if all the evidence were properly evaluated. As discussed
6 supra, the ALJ credited inconsistent opinions regarding mental health limitations;
7 thus, the ALJ needs to address that conflict on remand. Further proceedings are
8 necessary for the ALJ to properly consider the medical opinions, properly
9 determine Plaintiff's credibility regarding his symptom reporting, and formulate a
10 new RFC. The ALJ may also need to supplement the record with any outstanding
11 medical evidence and elicited testimony from a medical, psychological, and
12 vocational expert.

13 CONCLUSION

14 IT IS ORDERED:

- 15 1. Plaintiff's motion for summary judgment (ECF No. 19) is **GRANTED in**
16 **part**, and the matter is **REMANDED** to the Commissioner for additional
17 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).
- 18 2. Defendant's motion for summary judgment (ECF No. 20) is **DENIED**.

1 The District Court Executive is directed to file this Order, enter
2 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**
3 **THE FILE.**

4 DATED this 17th day of March, 2017.

5 s/Mary K. Dimke
6 MARY K. DIMKE
7 UNITED STATES MAGISTRATE JUDGE
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