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5
6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8
9 EUNICE BROWN,

10 Plaintiff,

11 v.

12
13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.

No. 1:15-CV-03219-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

16 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
17 No. 21, 22. Attorney D. James Tree represents Eunice Brown (Plaintiff); Special
18 Assistant United States Attorney Richard M. Rodriguez represents the
19 Commissioner of Social Security (Defendant). The parties have consented to
20 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
21 record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion
22 for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;
23 and **REMANDS** the matter to the Commissioner for additional proceedings
24 pursuant to 42 U.S.C. § 405(g).

25 **JURISDICTION**

26 Plaintiff filed applications for Supplemental Security Income (SSI) and
27 Disability Insurance Benefits (DIB) on February 19, 2012, Tr. 230, alleging
28 disability since February 1, 2012, Tr. 196-209, due to a broken bone in his wrist,

1 depression, anxiety, pulling his hair out, and back pain, Tr. 234. The applications
2 were denied initially and upon reconsideration. Tr. 126-133, 139-156.

3 Administrative Law Judge (ALJ) Ilene Sloan held a hearing on February 13, 2014,
4 and took testimony from Plaintiff and vocational expert Kimberly Mullinax. Tr.
5 33-73. The ALJ issued an unfavorable decision on June 12, 2014. Tr. 19-28. The
6 Appeals Council denied review on November 3, 2015. Tr. 1-6. The ALJ's June
7 12, 2014, decision became the final decision of the Commissioner, which is
8 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
9 action for judicial review on December 31, 2015. ECF No. 1, 4.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was 29 years old at the alleged date of onset. Tr. 203. Plaintiff's
15 last completed grade was the eighth in 1997. Tr. 235. At the time of his
16 application, he was working as a caregiver for the State of Washington. Tr. 234-
17 235. His prior work experience included the positions of telemarketer and youth
18 coordinator through AmeriCorps. Tr. 235.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
25 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
27 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
28 another way, substantial evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
2 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
3 interpretation, the court may not substitute its judgment for that of the ALJ.
4 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
5 findings, or if conflicting evidence supports a finding of either disability or non-
6 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
7 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
8 substantial evidence will be set aside if the proper legal standards were not applied
9 in weighing the evidence and making the decision. *Browner v. Secretary of Health*
10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
13 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
14 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
15 through four, the burden of proof rests upon the claimant to establish a prima facie
16 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
17 burden is met once the claimant establishes that physical or mental impairments
18 prevent him from engaging in his previous occupations. 20 C.F.R. §§
19 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
20 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
21 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
22 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
23 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot
24 make an adjustment to other work in the national economy, a finding of "disabled"
25 is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

26 **ADMINISTRATIVE DECISION**

27 On June 12, 2014, the ALJ issued a decision finding Plaintiff was not
28 disabled as defined in the Social Security Act.

1 At step one, the ALJ found Plaintiff had engaged in substantial gainful
2 activities from January 1, 2012, through March 31, 2012. Tr. 21. However, the
3 ALJ also found that from April 1, 2012, through the date of her decision, Plaintiff
4 had not engaged in substantial gainful activity since. *Id.* Therefore, she continued
5 the sequential evaluation process.

6 At step two, the ALJ determined Plaintiff had the severe impairment of
7 status post right wrist fracture. Tr. 22.

8 At step three, the ALJ found Plaintiff did not have an impairment or
9 combination of impairments that met or medically equaled the severity of one of
10 the listed impairments. Tr. 23.

11 At step four, the ALJ assessed Plaintiff's residual function capacity and
12 determined he could perform a range of medium work with the following
13 limitations:

14 He can frequently push/pull with his right upper extremity. He has an
15 unlimited ability to climb ramps and stairs. He can never climb
16 ladders, ropes, or scaffolding. He has an unlimited ability to balance,
17 stoop, kneel, and crouch. He can never crawl. He can frequently
18 handle and finger with his right upper extremity.

19 Tr. 23. The ALJ found that Plaintiff was able to his perform past relevant work as
20 a child monitor and as a recreation aid. Tr. 26.

21 In the alternative to a step four determination, the ALJ found at step five
22 that, considering Plaintiff's age, education, work experience and residual
23 functional capacity, and based on the testimony of the vocational expert, there
24 were other jobs that exist in significant numbers in the national economy Plaintiff
25 could perform, including the jobs of cleaner/housekeeper, industrial cleaner, and
26 hospital cleaner. Tr. 26-27. The ALJ thus concluded Plaintiff was not under a
27 disability within the meaning of the Social Security Act at any time from the
28 alleged onset date, February 1, 2012, through the date of the ALJ's decision, June

1 12, 2014. Tr. 28.

2 ISSUES

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh
6 medical opinions, (2) failing to find Plaintiff's psychological impairments severe at
7 step two, and (3) failing to properly credit Plaintiff's testimony.

8 DISCUSSION

9 A. Medical Opinions

10 In weighing medical source opinions, the ALJ should distinguish between
11 three different types of physicians: (1) treating physicians, who actually treat the
12 claimant; (2) examining physicians, who examine but do not treat the claimant;
13 and, (3) nonexamining physicians who neither treat nor examine the claimant.
14 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
15 weight to the opinion of a treating physician than to the opinion of an examining
16 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
17 should give more weight to the opinion of an examining physician than to the
18 opinion of a nonexamining physician. *Id.*

19 When an examining physician's opinion is not contradicted by another
20 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
21 and when an examining physician's opinion is contradicted by another physician,
22 the ALJ is only required to provide "specific and legitimate reasons" to reject the
23 opinion. *Lester*, 81 F.2d at 830-831.

24 The specific and legitimate standard can be met by the ALJ setting out a
25 detailed and thorough summary of the facts and conflicting clinical evidence,
26 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
27 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
28 conclusions, she "must set forth [her] interpretations and explain why they, rather

1 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
2 1988).

3 **1. Mary C. Pellicer, M.D.**

4 On May 21, 2012, Dr. Pellicer completed a physical consultative
5 examination of Plaintiff diagnosing him with chronic right wrist pain with
6 weakness and decreased range of motion status post fracture and repeated injuries,
7 intermittent back and right shoulder pain probably muscular in origin, and depression
8 and anxiety with trichotillomania. Tr. 286. Dr. Pellicer opined that Plaintiff had
9 no restrictions in standing, walking, or sitting, he could not lift or carry with his
10 right hand, he could not crawl or climb, he could not manipulate with his right hand,
11 and he was able to see hear, speak and travel independently and do all necessary
12 daily self-care. *Id.*

13 The ALJ gave Dr. Pellicer's opinion "little to no weight" because the
14 opinion was not consistent with her examination findings, she was only a one time
15 examiner, she based her opinion on Plaintiff's unreliable self-reports, the opinion
16 was inconsistent with Plaintiff's work history, and Dr. Pellicer was not able
17 consider the credibility concerns raised at Plaintiff's hearing. Tr. 25-26.

18 The ALJ's first reason for rejecting Dr. Pellicer's opinion, that it was
19 inconsistent with her evaluation results, is not supported by substantial evidence.
20 The ALJ noted that Dr. Pellicer found only slightly decreased right wrist range of
21 motion with no swelling or deformity and this failed to support a preclusion from
22 any lifting, carrying, or manipulation with the right hand. Tr. 25. The evaluation
23 showed a decreased radial deviation and extension on the right wrist, decreased
24 sensation to light touch over the right forearm and hand. In coordination testing,
25 the Plaintiff was considered slow and clumsy with complaints of pain when using
26 the right hand, and in strength testing, Plaintiff had reduced strength on the right
27 from the shoulders down to the handgrip. Tr. 285-286. Therefore, substantial
28 evidence does not support the ALJ's conclusion that Dr. Pellicer's opinion was

1 inconsistent with her evaluation.

2 The ALJ’s second reason for rejecting Dr. Pellicer’s opinion, that it was the
3 result of a one-time evaluation, is not legally sufficient. While this may be a reason
4 to give Dr. Pellicer’s opinion lessor weight than that of a treating physician, *see*
5 *Lester*, 81 F.2d at 830, it is not a reason to reject an opinion outright. This is
6 especially the case here, where there was no treating physician and the only other
7 opinions regarding physical limitations in the record are those of nonexamining
8 state agency physicians. *See* Tr. 79-83, 106-109. As such, this reason is not
9 legally sufficient to reject Dr. Pellicer’s opinion.

10 The ALJ’s third reason for rejecting Dr. Pellicer’s opinion, that she based
11 her opinion on Plaintiff’s unreliable self-reports, is not legally sufficient. An ALJ
12 may discount the opinions of a treating provider because they were based “to a
13 large extent” on the claimant’s reports of symptoms, which the ALJ found not
14 reliable; however, the ALJ must provide a basis for her determination that the
15 treating provider’s opinion was based “to a large extent” on the claimant’s
16 symptom reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here,
17 the ALJ failed to provide a basis for her determination that Dr. Pellicer’s opinion
18 was based to a large extent on Plaintiff’s self-reports. Therefore, this reason is also
19 not legally sufficient.

20 The ALJ’s fourth reason for rejecting Dr. Pellicer’s opinion, that her opinion
21 was inconsistent with Plaintiff’s work history, is not legally sufficient. Here, the
22 ALJ noted that the claimant was able to work despite his alleged symptoms for
23 many years and that this was inconsistent with the opinion provided to Dr. Pellicer.
24 Tr. 24, 26. Plaintiff’s earnings record did show that he continued to earn
25 substantial gainful activity after his alleged date of onset. Tr. 227. However, that
26 earnings record dropped below substantial gainful activity levels after the first
27 quarter of 2012. *Id.* Dr. Pellicer’s evaluation is the only evidence of physical
28 impairments in the record and it was completed on May 21, 2012, after Plaintiff’s

1 earnings dropped in the second quarter of 2012. Therefore, there is no substantial
2 evidence in the record to support the ALJ's conclusion that Plaintiff's impairment
3 level was the same while Plaintiff worked as it was at the time of Dr. Pellicer's
4 opinion.

5 The ALJ's final reason for rejecting Dr. Pellicer's opinion, that she was not
6 able to consider the credibility concerns raised at Plaintiff's hearing, is not legally
7 sufficient. As discussed above, a claimant's credibility becomes an issue in
8 weighing medical source opinions when that opinion is to a large extent based on
9 the claimant's self-reports. *See Ghanim*, 763 F.3d at 1162. Here the ALJ failed to
10 state why she concluded that Plaintiff's statements were based on Plaintiff's self-
11 reports. Therefore, the credibility of Plaintiff's testimony at the hearing is
12 immaterial to the weight given to Dr. Pellicer's opinion.

13 Considering Dr. Pellicer's opinion is the only opinion regarding Plaintiff's
14 physical impairments in the record of a provider who examined Plaintiff and the
15 ALJ failed to provide legally sufficient reasons to reject her opinion, the case is
16 remanded for the ALJ to readdress the opinion.

17 **2. Manuel Gomes, Ph.D.**

18 On May 20, 2012, Dr. Gomes completed a psychological consultative
19 evaluation of Plaintiff. Tr. 274-279. Dr. Gomes diagnosed Plaintiff with
20 psychosis, a learning disability, and post-traumatic stress disorder (PTSD). Tr.
21 278. Dr. Gomes stated that "[t]his is an incomplete clinical picture because of the
22 lack of any supportive secondary information. Thus, this report is based on
23 evaluation of his self-reported current conditions only." *Id.* Dr. Gomes opined the
24 following:

25 The claimant has [a] mild impairment with his current status
26 performing simple and repetitive tasks, but he has [a] severe
27 impairment with his ability to perform complex, detailed tasks. Based
28 on his mental confusion, he needed alternative explanations and repeats
to respond to questions and accomplish tasks.

1 He has moderate severity in his ability to accept supervision and then
2 only simple supervision from supervisors. He does not have a work
3 history to indicate his past interactions with others or with his
4 performance level.

5 There is marked[] impair[ment] in his ability to work comfortably
6 without special or additional instructions. He has difficulty retaining
7 data long enough to manipulate information. His concrete processing
8 limited his processing of new information and thus requires additional
9 specific instructions.

9 He would be markedly impairment in his ability to maintain regular
10 attendance in the workplace. . . .

11 He has a moderate impairment with his ability to deal with the usual
12 stresses encountered in the workplace. His cognitive deficits and
13 mental confusion would further create severe impairment in his ability
14 to deal with additional stressors normally encountered at the workplace.

15 Tr. 278-279. The ALJ gave “little weight” to the opinion of Dr. Gomes, stating
16 that “[h]e predicated his opinion on diagnoses that do not constitute medical
17 determinable or severe impairments,” that he based the limitations on Plaintiff’s
18 unreliable self-report, and that his opinion was not consistent with Plaintiff’s daily
19 activities. Tr. 23.

20 The first reason the ALJ provided for rejecting Dr. Gomes’ opinion, that it
21 was predicated on diagnoses that do not constitute medically determinable or
22 severe impairments, is not supported by substantial evidence. To establish the
23 existence of a medically determinable impairment, the claimant must provide
24 medical evidence consisting of “signs—the results of ‘medically acceptable
25 clinical diagnostic techniques,’ such as tests—as well as symptoms.” *Ukolov v.*
26 *Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005), *citing* S.S.R. 96-4p. A claimant’s
27 own statement of symptoms alone is not enough to establish a medically
28 determinable impairment. *See* 20 C.F.R. §§ 404.1508, 416.908. Dr. Gomes stated

1 that his evaluation lacked any supportive secondary information and that his report
2 was based on an evaluation of Plaintiff's "self-reported current conditions only."
3 Tr. 278. However, Dr. Gomes also completed a mental status examination. Tr.
4 275-278. When a symptom becomes observable apart from a claimant's
5 statements through medical acceptable clinical diagnostic techniques, it becomes a
6 sign. 20 C.F.R. §§ 404.1528, 416.928. Therefore, to the extent that Dr. Gomes'
7 diagnoses is supported by the mental status examination, they meet the criteria of a
8 medically determinable impairment. However, the existence of a medically
9 determinable impairment does not equate to a severe impairment. Considering the
10 case is being remanded to address Dr. Pellicer's opinion, the ALJ will also address
11 the step two determination on remand.

12 The ALJ's second reason for rejecting Dr. Gomes' opinion, that it was based
13 on Plaintiff's unreliable self-report, is legally sufficient. An ALJ may discount the
14 opinions of a provider because they were based "to a large extent" on the
15 claimant's reports of symptoms, which the ALJ found not reliable; however, the
16 ALJ must provide a basis for her determination that the treating provider's opinion
17 was based "to a large extent" on the claimant's symptom reports. *Ghanim*, 763
18 F.3d at 1162. Here, the ALJ found that Dr. Gomes based his opinion to a large
19 extent on Plaintiff's self-report because Dr. Gomes stated so in his report. Tr. 23,
20 278. However, since this case is being remanded to address Dr. Pellicer's opinion
21 regarding Plaintiff's physical impairments, the ALJ is further instructed to
22 reconsider Dr. Gomes' opinion as well.

23 The ALJ's third reason for rejecting Dr. Gomes' opinion, that it was
24 inconsistent with Plaintiff's daily activities, is not legally sufficient. A claimant's
25 testimony about his daily activities may be seen as inconsistent with the presence
26 of a disabling condition. *See Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir.
27 1990). The ALJ specifically found that Plaintiff's ability to spend time with his
28 two children, read books to his daughter, help his son with homework, assist with

1 household chores, do his own laundry, and drive a car were inconsistent with the
2 level of impairment opined by Dr. Gomes. Tr. 23, 25. Here, the ALJ failed to
3 state how these activities are inconsistent with the limitations addressed by Dr.
4 Gomes. As such, upon remand, the ALJ is to readdress Dr. Gomes' opinion as
5 well.

6 **3. Stage Agency Psychologists**

7 On June 12, 2012, and July 3, 2012, state agency psychologists, Patricia
8 Kraft, Ph.D., and Vincent Gollogly, Ph.D., determined that Plaintiff had the
9 diagnoses of schizophrenia and other psychotic disorders, and anxiety disorders.
10 Tr. 79-85, 106-111. They opined that Plaintiff had a moderate limitation in the
11 ability to understand and remember detailed instructions, stating that Plaintiff had
12 the ability to understand and remember simple tasks. Tr. 84, 110. They opined
13 that Plaintiff was moderately limited in the abilities to (1) carry out detailed
14 instructions, (2) to sustain an ordinary routine without special supervision, and (3)
15 to make simple work-related decisions, stating that Plaintiff "can attend and persist
16 with simple tasks and may need special help and attention from his supervisor."
17 Tr. 84, 110-111. They further opined that Plaintiff had a moderate limitation in the
18 ability to respond appropriately to changes in the work setting, stating that he can
19 make simple work related changes. Tr. 85, 111.

20 The ALJ gave their opinions "little weight" for the same reasons she gave
21 Dr. Gomes' opinion little weight. Tr. 23. Considering these three opinions, Dr.
22 Gomes', Dr. Kraft's, and Dr. Gollogly's, are the only psychological opinions in the
23 file, the ALJ will reconsider all three opinions upon remand.

24 **B. Step Two**

25 Plaintiff challenges the ALJ's finding that Plaintiff's psychological disorders
26 were not medically determinable impairments and not severe at step two. ECF No.
27 21 at 4-8.

28 As discussed above, the determination that Plaintiff's alleged psychological

1 impairments are not medically determinable impairments is not supported by
2 substantial evidence. As for the severity of those impairments, step-two of the
3 sequential evaluation process requires the ALJ to determine whether or not the
4 claimant “has a medically severe impairment or combination of impairments.”
5 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R.
6 §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). “An impairment or combination of
7 impairments can be found ‘not severe’ only if the evidence establishes a slight
8 abnormality that has ‘no more than a minimal effect on an individual[’]s ability to
9 work.” *Id.* at 1290 (quoting *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
10 (adopting S.S.R. 85-28)). The step-two analysis is “a *de minimis* screening device
11 to dispose of groundless claims.” *Smolen*, 80 F.3d at 1290.

12 In her decision, the ALJ noted that Plaintiff had a diagnosis of psychotic
13 disorder, PTSD, and learning disorder, but found that they did not qualify as a
14 medically determinable impairments and were not severe. Tr. 22. In coming to
15 this determination, the ALJ gave “little weight” to the opinions of Manuel Gomes,
16 Ph.D., and the state agency psychological consultants. Tr. 23. As discussed
17 above, the case is being remanded with instructions for the ALJ to readdress these
18 opinions. Likewise, the ALJ is to readdress the step two determination regarding
19 Plaintiff’s alleged mental health impairments.

20 **C. Claimant’s Subjective Statements**

21 Plaintiff contests the ALJ’s adverse credibility determination in this case.
22 ECF No. 21 at 11-20.

23 The evaluation of a claimant’s statements regarding limitations relies, in
24 part, on the assessment of the medical evidence. *See* 20 C.F.R. §§ 404.1529(c),
25 416.929(c); S.S.R. 16-3p. Therefore, in light of the case being remanded for the
26 ALJ to address the medical source opinions of Dr. Pellicer and Dr. Gomes, a new
27 assessment of Plaintiff’s subjective symptom statements is necessary in accord
28 with S.S.R. 16-3p.

1 **DENIED.**

2 2. Plaintiff's Motion for Summary Judgment, **ECF No. 21, GRANTED,**
3 and the matter is **REMANDED** to the Commissioner for additional proceedings
4 consistent with this Order.

5 3. Application for attorney fees may be filed by separate motion.

6 The District Court Executive is directed to file this Order and provide a copy
7 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
8 and the file shall be **CLOSED.**

9 DATED March 2, 2017.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

12 JOHN T. RODGERS
13 UNITED STATES MAGISTRATE JUDGE
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