

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

**Feb 12, 2018**

SEAN F. MCAVOY, CLERK

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

TIMOTHY FIELDS,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:17-cv-03058-MKD

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

ECF Nos. 15, 16

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants, in part, Plaintiff's motion (ECF No. 15) and denies Defendant's motion (ECF No. 16).

**JURISDICTION**

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

## STANDARD OF REVIEW

1  
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, 409-10 (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] physical or mental ability to do basic work activities,” the  
6 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c); 416.920(c). If the  
7 claimant’s impairment does not satisfy this severity threshold, however, the  
8 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 limitations, 20 C.F.R. §§ 404.1545(a)(1);

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

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

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

18 The claimant bears the burden of proof at steps one through four above.  
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant  
2 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);  
3 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 4 **ALJ’S FINDINGS**

5 Plaintiff protectively filed an application for Title II disability insurance  
6 benefits and Title XVI supplemental security income benefits on July 5, 2013,  
7 alleging a disability onset date of December 31, 2009. Tr. 211-23, 234. The  
8 applications were denied initially, Tr. 141-56, and on reconsideration, Tr. 159-70.  
9 Plaintiff appeared at a hearing before an Administrative Law Judge (ALJ) on June  
10 30, 2015. Tr. 45-83. At this hearing, Plaintiff amended his alleged date of onset to  
11 October 1, 2011. Tr. 49-51. On July 31, 2015, the ALJ denied Plaintiff’s claim.  
12 Tr. 21-36.

13 At step one, the ALJ found that Plaintiff has not engaged in substantial  
14 gainful activity since October 1, 2011. Tr. 24. At step two, the ALJ found  
15 Plaintiff has the following severe impairments: coronary artery disease and chronic  
16 bronchitis. *Id.* At step three, the ALJ found that Plaintiff does not have an  
17 impairment or combination of impairments that meets or medically equals a listed  
18 impairment. Tr. 29. The ALJ then concluded that Plaintiff has the RFC to perform  
19 light work, with the following non-exertional limitations:

20 [H]e can frequently balance and climb ramps and stairs. The claimant  
has no limitation [in] stooping, kneeling, crouching or crawling. He

1 can occasionally climb ladders, ropes and scaffolds. The claimant is  
2 limited to frequent reaching, handling and fingering with the left upper  
3 extremity. He should avoid concentrated exposure to extreme cold,  
fumes, odors, dusts, gases, poor ventilation and hazards such as moving  
machinery and unprotected heights.

4 Tr. 29. At step four, the ALJ found that Plaintiff is not able to perform relevant  
5 past work. Tr. 34. At step five, the ALJ found that there are other jobs that exists  
6 in significant numbers in the national economy that Plaintiff could perform within  
7 his assessed RFC, such as cashier II, production assembler, and cleaner  
8 housekeeping. Tr. 35. On that basis, the ALJ concluded that Plaintiff was not  
9 disabled as defined in the Social Security Act during the adjudicative period. *Id.*

10 On January 25, 2017, the Appeals Council denied review, Tr. 1-6, making  
11 the Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C.  
12 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

### 13 ISSUES

14 Plaintiff seeks judicial review of the Commissioner's final decision denying  
15 him disability insurance benefits under Title II and supplemental security income  
16 benefits under Title XVI of the Social Security Act. ECF No. 15. Plaintiff raises  
17 the following issues for this Court's review:

- 18 1. Whether the ALJ properly weighed the medical opinion evidence;
- 19 2. Whether the ALJ properly weighed lay witness statements;
- 20 3. Whether the ALJ made a proper step two determination; and

1 4. Whether the ALJ properly weighed Plaintiff's symptom claims.

2 ECF No. 15 at 4.

3 **DISCUSSION**

4 **A. Medical Opinion Evidence**

5 Plaintiff contends the ALJ erred by failing to consider the opinion of Sandra  
6 Elsner, LCSW, and by improperly weighing the opinions of David Lindgren, M.D.  
7 and Vengopal Bellum, M.D. ECF No. 15 at 4-13.

8 There are three types of physicians: "(1) those who treat the claimant  
9 (treating physicians); (2) those who examine but do not treat the claimant  
10 (examining physicians); and (3) those who neither examine nor treat the claimant  
11 but who review the claimant's file (nonexamining or reviewing physicians)."  
12 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).  
13 "Generally, a treating physician's opinion carries more weight than an examining  
14 physician's, and an examining physician's opinion carries more weight than a  
15 reviewing physician's." *Id.* "In addition, the regulations give more weight to  
16 opinions that are explained than to those that are not, and to the opinions of  
17 specialists concerning matters relating to their specialty over that of  
18 nonspecialists." *Id.* (citations omitted).

19 If a treating or examining physician's opinion is uncontradicted, an ALJ may  
20 reject it only by offering "clear and convincing reasons that are supported by



1 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
2 “However, the ALJ need not accept the opinion of any physician, including a  
3 treating physician, if that opinion is brief, conclusory and inadequately supported  
4 by clinical findings.” *Bray*, 554 F.3d at 1228 (internal quotation marks and  
5 brackets omitted). “If a treating or examining doctor’s opinion is contradicted by  
6 another doctor’s opinion, an ALJ may only reject it by providing specific and  
7 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at  
8 1216 (citing *Lester*, 81 F.3d at 830-31).

9           1.           *Ms. Elsner*

10           On May 11, 2012 Sandra Elsner, LCSW completed a Documentation  
11 Request for Medical or Disability Condition for the Washington State Department  
12 of Social and Health Services (DSHS). Tr. 531-34. On the form, Ms. Elsner stated  
13 that Plaintiff had major depressive disorder and opined that Plaintiff was unable to  
14 participate in work activities or activities related to preparing for and looking for  
15 work by checking the box next to the number zero as the total number hours  
16 Plaintiff could perform these activities. Tr. 531. She stated that Plaintiff “reports  
17 problems being around people and constant rumination about past, present, and  
18 future which likely interferes with ability to participate in work activities.” *Id.*  
19 She opined that Plaintiff’s condition should be reassessed in six to twelve months.  
20 Tr. 533.

1 Ms. Elsner does not qualify as an acceptable medical source. *See* 20 C.F.R.  
2 §§ 404.1502, 416.902.<sup>1</sup> (Acceptable medical sources are licensed physicians,  
3 licensed or certified psychologists, licensed optometrists, licensed podiatrists, and  
4 qualified speech-language pathologists.). An ALJ is required to consider evidence  
5 from non-acceptable medical sources. 20 C.F.R. §§ 404.1527(f), 416.927(f).<sup>2</sup> An  
6 ALJ must give reasons “germane” to each source in order to discount evidence  
7 from non-acceptable medical sources. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th  
8 Cir. 2014).

9 The ALJ’s decision fails to address Ms. Elsner’s opinion by name, by  
10 exhibit, or by date. Tr. 21-36. As Plaintiff’s treating mental health counselor, Mr.  
11 Elsner’s opinion constituted relevant and probative evidence that the ALJ was  
12 required to discuss. *See Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)  
13 (the ALJ must explain the rejection of all relevant and probative evidence).  
14 Considering Ms. Elsner’s opinion was not reflected in the RFC determination, it

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16 <sup>1</sup> Prior to March 27, 2017, the definition of an acceptable medical source  
17 was located at 20 C.F.R. §§ 404.1513, 416.913.

18 <sup>2</sup> Prior to March 27, 2017, the requirement that an ALJ consider evidence  
19 from non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),  
20 416.913(d).

1 was rejected without comment, which is error. 20 C.F.R. §§ 404.1527(f),  
2 416.927(f).<sup>3</sup> Defendant asserts that any error from the ALJ’s failure to address Ms.  
3 Elsner’s opinion is harmless for three reasons: (1) her opinion addresses an issue  
4 reserved to the ALJ; (2) she opined the condition was temporary; and (3) she is not  
5 an acceptable medical source. ECF No. 16 at 9-11. These reasons are insufficient  
6 to support a finding of harmless error.

7 First, Defendant asserts that Ms. Elsner’s opinion addresses an issue  
8 reserved to the ALJ, so her opinion “added noting material to the analysis.” ECF  
9 No. 16 at 9. Defendant is accurate that whether or not a claimant is disabled is an  
10 issue reserved for the ALJ and is, therefore, not a medical opinion and not due any  
11 special significance. 20 C.F.R. §§ 404.1527(d); 416.927(d). However, Ms.  
12 Elsner’s opinion addressing the hours Plaintiff would be capable of performing  
13 basic work activities are considered functional opinions and must be addressed by  
14

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15 <sup>3</sup> Prior to March 27, 2017, the requirement to address non-acceptable  
16 medical sources was reflected in S.S.R. 06-03p, 2006 WL 2329939 (August 9,  
17 2006), which required Social Security to consider “all relevant evidence in the case  
18 record,” including medical sources who were not considered acceptable medical  
19 sources.  
20

1 the ALJ. *See Hill*, 698 F.3d at 1160 (a treating physician’s statement that the  
2 claimant would be “unlikely” to work full time was not a conclusory statement like  
3 those described in 20 C.F.R. §§ 404.1527(d), 416.927(d)).

4       Second, Defendant asserts that the opined limitations were temporary, and  
5 therefore did not meet the durational requirement for disability. ECF No. 16 at 10.  
6 Ms. Elsner did not state how long she expected Plaintiff’s condition to last, but  
7 stated that he should be reassessed in six to twelve months. Tr. 533. Despite  
8 Plaintiff’s assertions otherwise, the opinion gives no indication that Plaintiff’s  
9 impairments were expected to improve, it simply provided treatment  
10 recommendations and a recommendation to reassess Plaintiff in the future. Tr.  
11 531-34. As such, the ALJ was required to address the opinion and make a  
12 determination as to whether the impairments met the durational requirements. Any  
13 assertion at this point that the opinion failed to meet the durational requirements is  
14 a *post hoc* rationalization, which cannot be considered by this Court. *See Orn v.*  
15 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will “review only the reasons  
16 provided by the ALJ in the disability determination and may not affirm the ALJ on  
17 a ground upon which [she] did not rely.”).

18       Third, Defendant asserts that Plaintiff is not an acceptable medical source,  
19 therefore, the ALJ’s determination to discount Plaintiff’s testimony is sufficient to  
20 discount Ms. Elsner’s opinion. ECF No. 16 at 10-11 (citing *Molina*, 674 F.3d at

1 1117). However, the holding in *Molina* only addressed lay witness testimony, not  
2 the opinion of a non-acceptable medical source. 674 F.3d at 1117. Here, Ms.  
3 Elsner was Plaintiff’s treating mental health counselor, Tr. 410, 416, 426-27, 432-  
4 36, and the code recognizes situations in which a treating non-acceptable medical  
5 source’s opinion as to a claimant’s functional ability may outweigh the opinion of  
6 an acceptable medical source and specifically requires the ALJ to articulate the  
7 weight given to such opinions. 20 C.F.R. §§ 404.1527(f), 416.927(f).<sup>4</sup> Therefore,  
8 in this case, the Court will not extend the holding in *Molina* to this treating non-  
9 acceptable medical source. The ALJ’s error in failing to address Ms. Elsner’s  
10 opinion was harmful and the case is remanded for the ALJ to properly address the  
11 opinion.

12 2. *Dr. Lindgren*

13 Dr. Lindgren completed three opinions, one on February 26, 2014, Tr. 402-  
14 04, and two on March 10, 2015, Tr. 521-23, 539-41. In the February 26, 2014  
15 opinion, Dr. Lindgren opined that Plaintiff would have to lay down about an hour  
16 per day due to back pain. Tr. 402. He further opined that if employed at a forty  
17 hour a week schedule, Plaintiff would miss four or more days per month due to his  
18 medical impairments and stated he was “severely limited,” which was defined as

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19  
20 <sup>4</sup> Prior to March 27, 2017, this requirement was reflected in S.S.R. 06-03p.

1 “[u]nable to lift at least 2 pounds or unable to stand and/or walk.” Tr. 403.

2 Additionally, he limited Plaintiff’s handling and reaching with the left upper  
3 extremity to occasional. *Id.* He opined that these limitations had been present  
4 since 1994. Tr. 404.

5 The first of the March 10, 2015 opinions appears to be the same February  
6 26, 2014 opinion with the treatment and signature dates changed to March 10,  
7 2015. Tr. 521-23. The second March 10, 2015 opinion is contained on a DSHS  
8 form, which concluded that Plaintiff is “Severely limited,” which was also defined  
9 as “[u]nable to lift at least 2 pounds or unable to stand or walk.” Tr. 539-41.

10 Despite the ultimate conclusion being the same in the two March 10, 2015  
11 opinions, Dr. Lindgren also found that Plaintiff had a decreased ability to lift, that  
12 he cannot sit or stand for long periods, and that he experienced exertional dyspnea  
13 on the DSHS form. Tr. 539. He then limited Plaintiff to zero hours per week for  
14 participating in work, looking for work, or preparing for work. *Id.* Additionally,  
15 Dr. Lindgren found that Plaintiff’s condition was permanent. Tr. 540.

16 When addressing Dr. Lindgren’s opinions, the ALJ only addressed the  
17 opinions expressed on the identical February 26, 2014 and March 10, 2015 forms  
18 and gave them “very little weight.” Tr. 33. The ALJ failed to address the March  
19 10, 2015 opinion expressed on a DSHS form. *Id.* Considering the ALJ’s decision  
20 is being remanded to address an undiscussed opinion from a non-acceptable

1 medical source, the ALJ is further instructed to readdress all three of Dr.  
2 Lindgren's opinions specifically on remand.

3           3.           *Dr. Bellum*

4           On January 8, 2010, Dr. Bellum completed a DSHS form opining that  
5 Plaintiff could not sit or stand for prolonged periods and could not lift over ten  
6 pounds. Tr. 306. He limited Plaintiff to sedentary work and stated that he could  
7 perform zero hours of work related activities, including attending educational or  
8 vocational classes. *Id.* He stated that Plaintiff's condition would likely limit his  
9 ability to work for twelve months. Tr. 307. The ALJ gave the opinion "no weight"  
10 because it was considered in connection with Plaintiff's prior claim for disability,  
11 which she declined to reopen, and it was predicated on chronic pain and coronary  
12 artery disease which Plaintiff failed to take medication to treat. Tr. 33.

13           Defendant is accurate in the assertion that the Ninth Circuit has found that  
14 medical opinions predating the alleged onset date are of limited relevance. ECF  
15 No. 16 at 8 (citing *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165  
16 (9th Cir. 2008)). Nonetheless, this case is being remanded for the ALJ to address  
17 medical opinions that limited Plaintiff's RFC in a similar fashion. *See supra.*  
18 Therefore, the ALJ is instructed to address this opinion anew on remand.

1 **B. Lay Witness Testimony**

2 Next, Plaintiff contends the ALJ improperly discounted the statements  
3 provided by his neighbor, Betty Alsup. ECF No. 15 at 13-15. An ALJ must  
4 consider the testimony of lay witnesses in determining whether a claimant is  
5 disabled. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006).  
6 Lay witness testimony regarding a claimant’s symptoms or how an impairment  
7 affects the ability to work is competent evidence and must be considered by the  
8 ALJ. If lay testimony is rejected, the ALJ “must give reasons that are germane to  
9 each witness.” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing  
10 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

11 The ALJ considered testimony from Plaintiff’s neighbor, Betty Alsup, and  
12 gave it little weight because her reports of Plaintiff’s reduced activity and pain  
13 were inconsistent with the medical evidence showing a refusal to accept a  
14 prescription for pain medication and a failure to seek medical care for his ailments.  
15 Tr. 34. Because remand is necessary in this case for the ALJ to properly address  
16 the medical source opinions, the ALJ is further instructed to address this lay  
17 witness testimony upon remand.

18 **C. Step Two**

19 Plaintiff contends the ALJ’s improperly failed to identify spinal conditions,  
20 leukocytosis, and mental health impairments as severe impairments at step two.



1 ECF No. 15 at 15-18. Plaintiff bears the burden to establish the existence of a  
2 severe impairment or combination of impairments, which prevents him from  
3 performing substantial gainful activity, and that the impairment or combination of  
4 impairments lasted for at least twelve continuous months. 42 U.S.C. §  
5 1382c(a)(3)(A). However, step two is “a de minimus screening device [used] to  
6 dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.  
7 1996). “Thus, applying our normal standard of review to the requirements of step  
8 two, [the Court] must determine whether the ALJ had substantial evidence to find  
9 that the medical evidence clearly established that [Plaintiff] did not have a  
10 medically severe impairment or combination of impairments.” *Webb v. Barnhart*,  
11 433 F.3d 683, 687 (9th Cir. 2005).

12         The ALJ found that Plaintiff had no medically determinable back or neck  
13 impairment, stating that “[t]he medical records show relatively few complaints of  
14 back pain and there are no imaging studies showing any degenerative/arthritis back  
15 condition.” Tr. 24. A physical or mental impairment is one that “results from  
16 anatomical, physiological, or psychological abnormalities which are demonstrable  
17 by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C.  
18 §§ 423(d)(3), 1382c(a)(3)(D). An impairment must be established by medical  
19 evidence consisting of signs, symptoms, and laboratory findings, and “under no  
20 circumstances may the existence of an impairment be established on the basis of

1 symptoms alone.” *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005) (citing  
2 S.S.R. 96-4p, 1996 WL 374187 (July 2, 1996)) (defining “symptoms” as an  
3 “individual’s own perception or description of the impact of” the impairment).

4 Plaintiff cites to a January 25, 2011 treatment note in which Dr. Bellum  
5 refers to an MRI showing mild degenerative disk disease and mild facet arthrosis.  
6 ECF No. 15 at 15 (citing Tr. 615). However, the record does not include any of the  
7 imaging reports. At the hearing, Plaintiff testified that Dr. Bellum was the  
8 provider who ordered the MRI in 2011. Tr. 52. Additionally, Plaintiff cited  
9 locations in the record where providers noted restricted range of motion in  
10 Plaintiff’s neck and back, tenderness with palpation, muscle spasms, and a  
11 decreased pulse in the left foot. ECF No. 15 at 15. Most notable of these citations  
12 include findings from Dr. Lindgren that upon examination Plaintiff had a  
13 decreased range of motion in his neck and a significantly weaker left upper  
14 extremity when compared to the right. Tr. 551, 560-61.

15 Since the case is being remanded for the ALJ to address opinion evidence in  
16 the record, the ALJ is further instructed to gather the 2011 imaging reports, if  
17 possible, and make a new step two determination regarding whether or not  
18 Plaintiff’s back and neck impairments constitute a medically determinable  
19 impairment and, if so, whether such impairment is severe.

1           Additionally, Plaintiff challenges the ALJ's determination that Plaintiff's  
2 leukocytosis and depression were medically determinable impairments, but found  
3 that they did not constitute severe impairments. ECF No. 15 at 16-18; Tr. 25, 27.  
4 Since the decision is being remanded to address medical opinions in the record,  
5 including the opinion of Plaintiff's mental health counselor, Ms. Elsner, the ALJ is  
6 directed to readdress all of Plaintiff's alleged impairments at step two, including  
7 his depression.

8 **D. Plaintiff's Symptom Claims**

9           Plaintiff faults the ALJ for failing to rely on reasons that were specific, clear  
10 and convincing in "discrediting" Plaintiff's subjective testimony. ECF No. 15 at  
11 18-20.

12           The evaluation of a claimant's symptom statements and their resulting  
13 limitations relies, in part, on the assessment of the medical evidence. *See* 20  
14 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p, 2016 (WL 5180304 (October 25,  
15 2017)). Therefore, in light of the case being remanded for the ALJ to address the  
16 medical source opinions in the file, a new assessment of Plaintiff's subjective  
17 symptom statements is necessary.

18 **E. Remand**

19           Plaintiff urges the Court to remand for immediate award of benefits. ECF  
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1 No. 15. To do so, the Court must find that the record has been fully developed and  
2 further administrative proceedings would not be useful. *Garrison v. Colvin*, 759  
3 F.3d 995, 1019-20 (9th Cir. 2014); *Varney v. Sec. of Health and Human Servs.*,  
4 859 F.2d 1396, 1399 (9th Cir. 1988). But where there are outstanding issues that  
5 must be resolved before a determination can be made, and it is not clear from the  
6 record that the ALJ would be required to find a claimant disabled if all the  
7 evidence were properly evaluated, remand is appropriate. *See Benecke v.*  
8 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,  
9 1179-80 (9th Cir. 2000).

10 Here, it is not clear from the record that the ALJ would be required to find  
11 Plaintiff disabled if all the evidence were properly evaluated. Further proceedings  
12 are necessary for the ALJ to properly weigh the opinions in the record, make a new  
13 step two determination, and properly address Plaintiff's symptom claims. The ALJ  
14 is instructed to supplement the record with any outstanding evidence, including the  
15 2011 MRI of Plaintiff's hips and back addressed above, and take testimony from a  
16 medical, a psychological, and a vocational expert at a remand hearing.

## 17 CONCLUSION

### 18 IT IS ORDERED:

19 1. Plaintiff's Motion for Summary Judgment (**ECF No. 15**) is **GRANTED**,  
20 in part, and the matter is **REMANDED** to the Commissioner for additional

1 proceedings consistent with this order.

2 2. Defendant's Motion for Summary Judgment (**ECF No. 16**) is **DENIED**.

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

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

7 DATED February 12, 2018.

8 *s/ Mary K. Dimke*  
9 Mary K. Dimke  
United States Magistrate Judge

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