

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

Jun 18, 2019

SEAN F. McAVOY, CLERK

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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 ROBERT M.,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL  
13 SECURITY,

14 Defendant.  
15  
16

No. 1:18-cv-03135-JTR

ORDER GRANTING, IN PART,  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

17 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
18 No. 11, 15. Attorney D. James Tree represents Robert M. (Plaintiff); Special  
19 Assistant United States Attorney Benjamin J. Groebner represents the  
20 Commissioner of Social Security (Defendant). The parties have consented to  
21 proceed before a magistrate judge. ECF No. 3. After reviewing the administrative  
22 record and the briefs filed by the parties, the Court **GRANTS, IN PART,**  
23 Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for  
24 Summary Judgment; and **REMANDS** the matter to the Commissioner for  
25 additional proceedings pursuant to 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed applications for Disability Insurance Benefits and  
28 Supplemental Security Income on August 5, 2014, alleging disability since

ORDER GRANTING, IN PART, PLAINTIFF'S MOTION . . . - 1

1 October 14, 2013, due to symptoms following an industrial electrocution, including  
2 confusion, disorientation, memory problems, and body shakes. Tr. 83. The  
3 applications were denied initially and upon reconsideration. Tr. 112-14, 119-23.  
4 Administrative Law Judge (ALJ) Keith Allred held a hearing on March 30, 2017,  
5 Tr. 50-76, and issued an unfavorable decision on July 31, 2017, Tr. 20-40.  
6 Plaintiff requested review of the ALJ's decision from the Appeals Council. Tr.  
7 180. The Appeals Council denied Plaintiff's request for review on June 14, 2018.  
8 Tr. 1-6. The ALJ's July 2017 decision thus became the final decision of the  
9 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
10 405(g). Plaintiff filed this action for judicial review on July 27, 2018. ECF No. 1.

### 11 **STATEMENT OF FACTS**

12 Plaintiff was born in 1962, and was 51 years old as of the alleged onset date.  
13 Tr. 38. He does not have a high school education or a GED. Tr. 54, 467, 585, 662.  
14 He worked most of his professional life as an electrician. Tr. 54, 467, 585. Due to  
15 multiple head traumas as a child and young adult, Plaintiff developed  
16 hydrocephalus and had a ventriculoperitoneal shunt placed in his mid-20s. Tr. 304

17 In June 2013, Plaintiff was electrocuted in a work accident. He did not  
18 immediately seek medical attention. A few days later, he presented to the  
19 emergency room with a bulge in his groin, which was diagnosed as a hernia, and  
20 was repaired the following month. Tr. 342, 350-51. Plaintiff continued to work as  
21 an electrician for a short time, but eventually felt as if his concentration and  
22 memory were deteriorating to the point that he was no longer safe to perform  
23 electrical work. Tr. 359. He reported worsening of his decades-long headache  
24 impairment, and worsening cognitive and social skills.

25 At the hearing, Plaintiff testified he was unable to work due to disorientation  
26 and confusion, and that he disliked being around people and thus was isolated at  
27 home much of the time and needed the comfort of his animals to calm himself  
28 down when anxious. Tr. 60-62.



1 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),  
2 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds  
3 to step five, and the burden shifts to the Commissioner to show that (1) the  
4 claimant can make an adjustment to other work; and (2) specific jobs which the  
5 claimant can perform exist in the national economy. *Batson v. Commissioner of*  
6 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make  
7 an adjustment to other work in the national economy, the claimant will be found  
8 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 9 **ADMINISTRATIVE DECISION**

10 On July 31, 2017, the ALJ issued a decision finding Plaintiff was not  
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
13 activity since October 14, 2013, the alleged onset date. Tr. 23.

14 At step two, the ALJ determined Plaintiff had the following severe  
15 impairments: migraine disorder, anxiety disorder, social anxiety disorder, organic  
16 brain disorder, and affective disorder. *Id.*

17 At step three, the ALJ found Plaintiff did not have an impairment or  
18 combination of impairments that met or medically equaled the severity of one of  
19 the listed impairments. Tr. 24-27.

20 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
21 Plaintiff could perform medium exertion level work with the following limitations:

22 He can lift or carry 50 pounds occasionally and 25 pounds frequently.  
23 He can sit for 6 hours in an 8-hour workday and can stand or walk for  
24 6 hours with normal rest breaks. The claimant can occasionally climb  
25 ramps or stairs, balance, stoop, bend, squat, kneel, or crouch. He may  
26 never crawl or climb ladders, ropes or scaffolds. The claimant may  
27 have no exposure to hazards including unprotected heights or  
28 dangerous machinery. The claimant is able to perform the basic  
mental demands of competitive, unskilled work, including the ability  
to understand, remember, and carry out simple instructions. He can

1 respond appropriately to supervision, coworkers, and usual work  
2 situations; and to deal with changes in a routine work setting. The  
3 claimant may have occasional interaction with supervisors,  
4 coworkers, and the general public.

4 Tr. 27.

5 At step four, the ALJ found Plaintiff was not able to perform his past  
6 relevant work as an electrician. Tr. 38.

7 At step five, the ALJ determined that, based on the testimony of the  
8 vocational expert, and considering Plaintiff's age, education, work experience, and  
9 RFC, Plaintiff was capable of making a successful adjustment to other work that  
10 existed in significant numbers in the national economy, including the jobs of hand  
11 packager, laundry laborer, and machine feeder. Tr. 38-39.

12 The ALJ thus concluded Plaintiff was not under a disability within the  
13 meaning of the Social Security Act at any time from October 14, 2013, the alleged  
14 onset date, through the date of the ALJ's decision, July 31, 2017. Tr. 39.

## 15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's  
17 decision denying benefits and, if so, whether that decision is based on proper legal  
18 standards.

19 Plaintiff contends the ALJ erred by (1) improperly rejecting medical and  
20 other opinion evidence<sup>1</sup>; (2) failing to properly address the listings at step three;  
21 and (3) improperly rejecting Plaintiff's subjective statements.

## 22 DISCUSSION

### 23 1. Medical opinion evidence

24 Plaintiff argues the ALJ erred by failing to properly consider the medical  
25 opinion evidence of record. ECF No. 11 at 4-13.

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27 <sup>1</sup> For clarity, the Court has addressed the assessment of the medical opinion  
28 evidence and the third party evidence under separate headings.

1           **A. Acceptable medical sources**

2           In a disability proceeding, the courts distinguish among the opinions of three  
3 types of acceptable medical sources: treating physicians, physicians who examine  
4 but do not treat the claimant (examining physicians) and those who neither  
5 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81  
6 F.3d 821, 830 (9th Cir. 1996). A treating physician’s opinion carries more weight  
7 than an examining physician’s opinion, and an examining physician’s opinion is  
8 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,  
9 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830.

10           In weighing the medical opinion evidence of record, an ALJ must make  
11 findings setting forth specific, legitimate reasons for his assessment that are based  
12 on substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751  
13 (9th Cir. 1989). The ALJ must also set forth the reasoning behind his or her  
14 decisions in a way that allows for meaningful review. *Brown-Hunter v. Colvin*,  
15 806 F.3d 487, 492 (9th Cir. 2015) (finding a clear statement of the agency’s  
16 reasoning is necessary because the Court can affirm the ALJ’s decision to deny  
17 benefits only on the grounds invoked by the ALJ).

18           When a treating physician’s opinion is not contradicted by another  
19 physician, the ALJ may reject the opinion by citing “clear and convincing”  
20 reasons; when a treating physician’s opinion is contradicted by another physician,  
21 the ALJ is only required to provide “specific and legitimate reasons,” based on  
22 substantial evidence, to reject the opinion. *Andrews v. Shalala*, 53 F.3d 1035, 1041  
23 (9th Cir. 1995). The specific and legitimate standard can be met by the ALJ setting  
24 out a detailed and thorough summary of the facts and conflicting clinical evidence,  
25 stating his interpretation thereof, and making findings. *Magallanes*, 881 F.2d at  
26 751. The ALJ is required to do more than offer his conclusions, he “must set forth  
27 his interpretations and explain why they, rather than the doctors’, are correct.”  
28 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

1                   **i.     Dr. Stobbe**

2                   In May 2014 Plaintiff was examined by Dr. Gary Stobbe through the  
3 University of Washington Headache Clinic. Tr. 359. Dr. Stobbe concluded that  
4 Plaintiff’s symptoms were likely functional in nature, and that underlying anxiety  
5 was playing a large role in his dysfunction. Tr. 360. Dr. Stobbe opined that proper  
6 lifestyle alterations and treatment could improve his symptoms, but that would take  
7 some time, considering it had been a year since Plaintiff’s injury, and he expected  
8 “another 6 to 12 months before we could expect him to be able to go back to  
9 work.” Id.

10                  While a medical provider’s opinion on the ultimate issue of disability is not  
11 owed any “special significance,” 20 C.F.R. § 404.1527(d), an ALJ is required to  
12 explain why “significant probative evidence has been rejected.” Vincent v.  
13 Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984). The ALJ did not mention this  
14 opinion in the decision. By failing to discuss this probative evidence, the ALJ  
15 erred.

16                  Defendant asserts Plaintiff has not demonstrated harm, as Dr. Stobbe’s  
17 report appeared to imply Plaintiff could not return to his prior work as an  
18 electrician, and not that he was unable to perform any work. ECF No. 15 at 12.  
19 Because the ALJ did not offer this explanation, and it is not immediately clear that  
20 Defendant’s interpretation is correct, the Court declines to find the ALJ’s error  
21 harmless on this basis.

22                   **ii.     Dr. Thompson**

23                  In March 2015, Plaintiff attended a neuropsychological evaluation with Dr.  
24 Jane Thompson. Tr. 455. Following a clinical interview and extensive objective  
25 testing over two days, Dr. Thompson concluded that “due to his severe anxiety and  
26 probable agoraphobia, along with his attention, memory, information processing  
27 speed, and executive function deficits, I do not believe Mr. McDanel is capable of  
28 gainful employment in any capacity.” Tr. 455. She felt with appropriate treatment

1 he may be able to reenter the workforce, but that it would take at least a year of  
2 therapies. *Id.* The ALJ gave Dr. Thompson’s report mixed weight, noting that her  
3 ultimate conclusion on disability was reserved for the Commissioner, and that she  
4 did not provide an opinion regarding Plaintiff’s residual mental capacities, making  
5 the basis for her opinion that he was unable to work “in any capacity” unclear. *Tr.*  
6 35. The ALJ further noted that testing results were average or low average on  
7 many measures, that Dr. Thompson’s opinion was at odds with the less severe  
8 conclusions of other mental examiners, and that she lacked longitudinal familiarity  
9 with Plaintiff. *Tr.* 35-36.

10 Plaintiff argues the ALJ’s rationale was insufficient. ECF No. 11 at 5-9.  
11 The Court finds that, while not all of the ALJ’s stated reasons are specific and  
12 legitimate, the ALJ offered sufficient reasons for giving this opinion lesser weight.  
13 The Regulations make clear that opinions on the ultimate issue of disability are not  
14 given any special significance. 20 C.F.R. § 404.1527(d)(3). The Commissioner  
15 also gives more weight to opinions that are well-explained. 20 C.F.R. §  
16 404.1527(b)(3). Though her opinion was accompanied by significant objective  
17 testing, Dr. Thompson did not offer a functional capacity assessment to explain  
18 why she thought Plaintiff was incapable of gainful employment “in any capacity.”  
19 The ALJ did not err in his discussion of this opinion.

20 **iii. Dr. Bachman**

21 Plaintiff underwent a neuropsychological evaluation with Dr. David  
22 Bachman in September 2016, in connection with his worker’s compensation claim.  
23 *Tr.* 565. Dr. Bachman concluded Plaintiff’s current status made him ineligible to  
24 return to his previous work as an electrician. *Id.* He further stated Plaintiff was  
25 “not capable of conforming to any rigid job requirements and could not be relied  
26 on because of mental health deficiencies.” *Tr.* 566. The ALJ gave this opinion  
27 partial weight, noting the opinion regarding returning to electrical work was  
28 consistent with the record. *Tr.* 36. The ALJ went on to note, however, that the



1 opinion was vague and inconsistent with other evidence of record, and contained  
2 internal inconsistencies with respect to Plaintiff's cooperation with the exam. *Id.*

3 Plaintiff asserts the ALJ's assessment is flawed as it failed to consider the  
4 entire context of the exam findings, and despite not having a longitudinal treatment  
5 history, Dr. Bachman conducted extensive objective testing in support of his  
6 findings. ECF No. 11 at 10-11. Plaintiff further argues that, had Dr. Bachman's  
7 opinion regarding unreliability been credited, Plaintiff would have been found  
8 unable to perform competitive work. *Id.* at 9.

9 The ALJ provided specific and legitimate reasons for discounting this  
10 opinion. Dr. Bachman did not offer any specific limitations regarding Plaintiff's  
11 ability to perform work in general, and did not explain what "rigid job  
12 requirements" or "could not be relied on" meant in terms of work-related  
13 functions. The ALJ's finding that the opinion is unreliably vague is supported by  
14 substantial evidence.

15 **iv. Dr. Friedman**

16 Plaintiff underwent a psychiatric exam in January 2016 with Dr. Michael  
17 Friedman, in connection with his worker's compensation claim. Tr. 657. Dr.  
18 Friedman noted Plaintiff's "presentation suggested global cognitive dysfunction to  
19 the point that I am surprised that he is able to live independently." Tr. 668. He  
20 went on to note that Plaintiff's "presentation suggests that he would not be able to  
21 return to gainful employment. This man works as a high voltage electrician. He  
22 does not believe he would be safe to return to employment." *Id.* The ALJ gave  
23 little weight to this report, noting that it was not certain whether Dr. Friedman's  
24 comment was intended as an opinion regarding work in general, which would be  
25 an issue reserved for the Commissioner, or just Plaintiff's ability to return to his  
26 prior work. Tr. 36. The ALJ also noted Dr. Friedman's comments regarding the  
27 difficulty he had interviewing and diagnosing Plaintiff and seeming incredulity at  
28

1 the incongruity of Plaintiff's presentation at the exam with still being able to live  
2 independently. Id.

3 Plaintiff argues the ALJ improperly inserted tone into Dr. Friedman's report  
4 where none existed, and disregarded a second report that indicated Dr. Friedman  
5 considered Plaintiff's impairments to be "Category 3" impairments under  
6 Washington State Labor and Industries Administrative Code, indicating Dr.  
7 Friedman must have been referring to all work when he stated Plaintiff could not  
8 return to gainful employment. ECF No. 11 at 11-12.

9 The Court finds no error in the ALJ's discussion. Dr. Friedman's first report  
10 is unclear as to whether he was restricting all work or just electrical work. The  
11 second report does not clarify the position the way Plaintiff argues, because despite  
12 designating Plaintiff's mental impairments as Category 3 for Labor and Industries,  
13 Dr. Friedman explicitly only restricted Plaintiff from working as an electrician, and  
14 then only based on Plaintiff's subjective reports of lack of confidence. Tr. 587.  
15 Even giving Plaintiff the benefit of the doubt and interpreting Dr. Friedman's first  
16 report as restricting Plaintiff from all gainful employment, the ALJ accurately  
17 noted this is an opinion reserved to the Commissioner and is not due any special  
18 significance. 20 C.F.R. § 404.1527(d)(3). Though Plaintiff encourages an  
19 alternative interpretation, the ALJ's interpretation of the tone of Dr. Friedman's  
20 report is reasonable and supported by substantial evidence.

21 **v. Drs. Clifford and Gilbert**

22 The State agency non-examining doctors, Dr. Clifford and Dr. Gilbert, both  
23 reviewed the file and offered opinions as to Plaintiff's mental residual functional  
24 capacity. Tr. 85-87, 101-03. The ALJ summarized these opinions and gave them  
25 considerable weight. Tr. 37. However, the ALJ failed to acknowledge that the  
26 opinions differed somewhat, in that Dr. Gilbert opined Plaintiff's "anxiety and  
27 depression would interfere with concentration and persistence that would create  
28

1 some limit in his ability to complete a normal workday or workweek.” Tr. 102.<sup>2</sup>  
2 The RFC does not include any limitations on Plaintiff’s ability to complete a  
3 normal workday or workweek. Tr. 27.

4 As this case is being remanded for further proceedings concerning other  
5 medical evidence, the ALJ will reconsider the entire medical record, including Dr.  
6 Gilbert’s opinion.

7 **B. Non-acceptable medical sources**

8 In March 2014, Plaintiff was seen at the University of Washington Headache  
9 Clinic by ARNP Sau Mui Chan-Goh. Tr. 362. Plaintiff was complaining of  
10 worsening headaches since his electrocution accident, along with memory trouble,  
11 difficulty concentrating, dizziness, mood lability, and confusion. Tr. 363.

12 Following this visit, ARNP Chan-Goh completed a Department of Labor and  
13 Industries form noting Plaintiff was not released to any work from August 2013  
14 through an undeterminable date. Tr. 489. The ALJ failed to mention this opinion  
15 in his decision.

16 In May 2015, Plaintiff established care with ARNP Cari Cowin. Tr. 595.  
17 For the following year and a half, Ms. Cowin repeatedly noted Plaintiff was not  
18 able to work due to his psychological symptoms and cognitive deficits. Tr. 596,  
19 599, 600, 603, 606, 608, 610-11, 612, 615, 617, 621, 625, 626, 628, 629, 632, 633,  
20 636, 639, 643. While many of these notes contained little explanation for this  
21 opinion, ARNP Cowin occasionally elaborated: “He really isn’t cognitively sound  
22 enough to complete a day of work,” Tr. 606, and “He is unstable psychologically,”  
23  
24

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25  
26 <sup>2</sup> The ALJ’s summary referenced only the opinion from Dr. Clifford that “his  
27 anxiety would interfere with concentration and task persistence at times but he  
28 retains the capacity to carry out work activities most of the time.” Tr. 38, 87.

1 Tr. 611.<sup>3</sup> The ALJ did not mention any of these treatment notes or opinions in his  
2 decision.

3 While an ALJ is not required to discuss every piece of evidence, he is  
4 required to explain why “significant probative evidence has been rejected.”  
5 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). The fact that  
6 Plaintiff’s treating providers believed him incapable of working due to his  
7 cognitive and psychological impairments is significant probative evidence. On  
8 remand, the ALJ will consider this evidence and give germane reasons if the  
9 opinions are discounted. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

## 10 **2. Plaintiff’s subjective complaints**

11 Plaintiff contends the ALJ erred by improperly rejecting his subjective  
12 complaints. ECF No. 11 at 19-21.

13 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
14 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be  
15 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
16 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying  
17 medical impairment, the ALJ may not discredit testimony as to the severity of an  
18 impairment merely because it is unsupported by medical evidence. *Reddick v.*  
19 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of  
20 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be  
21 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
22 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are  
23 insufficient: rather the ALJ must identify what testimony is not credible and what  
24 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v.*  
25 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

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26  
27 <sup>3</sup> At one visit in March 2016, ARNP Cowin stated Plaintiff was not employable as  
28 an electrician, but could do less complicated work. Tr. 619.

1           The ALJ concluded Plaintiff’s medically determinable impairments could  
2 reasonably be expected to cause his alleged symptoms; however, Plaintiff’s  
3 statements concerning the intensity, persistence and limiting effects of those  
4 symptoms were not entirely consistent with the medical and other evidence of  
5 record. Tr. 33. The ALJ found the evidence to be inconsistent regarding the extent  
6 of Plaintiff’s memory and concentration deficits, and found his demonstrated  
7 activities to show Plaintiff retained fair abilities in this area. Id. The ALJ further  
8 noted Plaintiff’s long history of being able to work with headaches and the  
9 eventual improvement of his headaches following adjustments to his shunt. Tr. 34.

10           The ALJ failed to offer clear and convincing reasons for finding Plaintiff’s  
11 subjective symptom testimony to be unreliable. While a claimant’s daily activities  
12 may support an adverse finding if the activities contradict the claimant’s other  
13 testimony, *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007), “ALJs must be  
14 especially cautious in concluding that daily activities are inconsistent with  
15 testimony about pain, because impairments that would unquestionably preclude  
16 work and all the pressures of a workplace environment will often be consistent  
17 with doing more than merely resting in bed all day.” *Garrison v. Colvin*, 759 F.3d  
18 995, 1016 (9th Cir. 2014). The ALJ found the evidence demonstrated Plaintiff had  
19 memory and concentration deficits, but that “it is not an utterly disabling  
20 condition,” as his ability to drive and grocery shop demonstrated fair abilities. Tr.  
21 33. “The Social Security Act does not require that claimant be utterly  
22 incapacitated to be eligible for benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1287  
23 n.7. The ALJ failed to explain how the ability to drive and grocery shop were  
24 inconsistent with Plaintiff’s allegations of disabling mental impairments.

25           The ALJ’s discussion of Plaintiff’s headaches is similarly insufficient. The  
26 ALJ is correct that Plaintiff reported his headaches to have returned to pre-injury  
27 level by late 2014, and that he declined drug therapies, reporting he was satisfied  
28 with the level of pain control received from ibuprofen. Tr. 442, 449. However, at

1 the same time, Plaintiff reported that his primary concerns were other symptoms,  
2 including dizziness, mood lability, cognitive trouble, confusion, and other weird  
3 sensations he could not describe in words. Tr. 362. This is consistent with  
4 Plaintiff's reports throughout the record. Tr. 357-58, 394, 416-17, 432, 465-66,  
5 513-14, 520, 529, 595, 599, 605, 662. The fact that one condition was somewhat  
6 controlled and was no longer his primary concern does not eliminate the difficulty  
7 he continued to experience from other symptoms.<sup>4</sup>

8 To the extent the ALJ implies Plaintiff's allegations are not supported by the  
9 objective evidence, this alone is an insufficient basis upon which to reject his  
10 statements. *Reddick*, 157 F.3d at 722.

11 Upon remand, the ALJ shall re-evaluate Plaintiff's statements and testimony  
12 along with the benefit of the reconsidered medical evidence. The ALJ shall  
13 reassess what statements, if any, are not consistent with the medical evidence and  
14 other evidence in the record, and what specific evidence undermines those  
15 statements.

### 16 **3. Third party evidence**

17 Plaintiff argues the ALJ erred in rejecting the evidence provided by  
18 Plaintiff's siblings. ECF No. 11 at 15-17.

19 Lay witness testimony is "competent evidence" as to "how an impairment  
20 affects [a claimant's] ability to work." *Stout v. Comm'r, Soc. Sec. Admin.*, 454  
21 F.3d 1050 (9th Cir. 2006); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th  
22 Cir. 1993) ("[F]riends and family members in a position to observe a claimant's  
23 symptoms and daily activities are competent to testify as to her condition.").

24 This claim is being remanded for reevaluation of the medical evidence and  
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26 <sup>4</sup> Despite headaches no longer being his primary concern, Plaintiff continued to  
27 report having headaches throughout the record. Tr. 514, 532, 595, 599-600, 608,  
28 618, 629.

1 Plaintiff's subjective reports. Therefore, upon remand the ALJ will also readdress  
2 the evidence submitted by Plaintiff's siblings regarding his functional abilities.

3 **4. Step three findings**

4 Plaintiff argues the ALJ failed to properly assess the Listings at step three.  
5 ECF No. 11 at 17-19. Specifically, Plaintiff asserts the ALJ erred in failing to  
6 discuss why the elements of Listing 11.02B were not met, and in assessing his  
7 level of functioning in the "paragraph B" criteria. *Id.*

8 A claimant is considered disabled at step three when his impairment meets  
9 the durational requirement and his impairments meet or equal a listed impairment  
10 in Appendix 1. 20 C.F.R. §§ 404.1520(d), 416.920(d). "An ALJ must evaluate the  
11 relevant evidence before concluding that a claimant's impairments do not meet or  
12 equal a listed impairment. A boilerplate finding is insufficient to support a  
13 conclusion that a claimant's impairment" does not meet or equal a listed  
14 impairment. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). However, the ALJ  
15 is not required to state why a claimant fails to satisfy every criteria of the listing if  
16 they adequately summarize and evaluate the evidence. See *Gonzalez v. Sullivan*,  
17 914 F.2d 1197, 1200-01 (9th Cir.1990); *Lewis*, 236 F.3d at 512.

18 At step three the ALJ found there was no evidence to show the existence of  
19 any impairment that met the criteria of any of the listed impairments in the  
20 Regulations. Tr. 25. He discussed the factors to be considered when assessing  
21 migraines under 11.02B and 11.02D. *Id.* The ALJ went on to discuss the detailed  
22 requirements of Listing 12.00 and the relevant "B criteria." Tr. 25-26. He did not  
23 specifically discuss why the criteria of Listing 11.02B were not met or equaled.

24 To meet Listing 11.02B, an individual must have "epilepsy, documented by  
25 a detailed description of a typical seizure and characterized by . . . (B) dyscognitive  
26 seizures, occurring at least once a week for at least 3 consecutive months despite  
27 adherence to prescribed treatment." 20 C.F.R. Part 404, Subpart P, Appendix 1,  
28 11.02B. Dyscognitive seizures "are characterized by alteration of consciousness

1 without convulsions or loss of muscle control. During the seizure, blank staring,  
2 change of facial expression, and automatisms (such as lip smacking, chewing or  
3 swallowing, or repetitive simple actions, such as gestures or verbal utterances) may  
4 occur.” Id. at 11.00H1b.

5 The record fails to establish any plausible argument that the listing was met  
6 or equaled. Lewis, 236 F.3d at 514. The record contains no indication that  
7 Plaintiff’s headaches cause any alteration to his consciousness. The ALJ discussed  
8 the longitudinal medical record, and thus was not required to discuss why the  
9 elements of each listing were not met.

10 With respect to the assessment of the B criteria, Plaintiff has failed to show  
11 that the ALJ erred in his evaluation of the evidence. The ALJ discussed at length  
12 each of the B criteria and the evidence he relied on in reaching the ratings in the  
13 various categories. Tr. 26. Though Plaintiff encourages a different interpretation  
14 of the record, the ALJ’s conclusions are supported by substantial evidence. *Batson*  
15 *v. Comm’r of Soc. Sec. Admin*, 359 F.3d 1190, 1193 (9th Cir. 2004) (“if evidence  
16 exists to support more than one rational interpretation, we must defer to the  
17 Commissioner’s decision”).

## 18 CONCLUSION

19 Plaintiff argues the ALJ’s decision should be reversed and remanded for the  
20 payment of benefits. The Court has the discretion to remand the case for additional  
21 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
22 (9th Cir. 1996). The Court may award benefits if the record is fully developed and  
23 further administrative proceedings would serve no useful purpose. Id. Remand is  
24 appropriate when additional administrative proceedings could remedy defects.  
25 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
26 finds that further development is necessary for a proper determination to be made.

27 The ALJ’s RFC determination is not supported by substantial evidence in  
28 this case and must be reevaluated. On remand, the ALJ shall reassess the medical



1 evidence, reevaluate Plaintiff's subjective complaints and the testimony of the  
2 third-parties, formulate a new RFC, obtain supplemental testimony from a  
3 vocational expert, if necessary, and take into consideration any other evidence or  
4 testimony relevant to Plaintiff's disability claim.

5 Accordingly, **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is  
7 **GRANTED, IN PART.**

8 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is  
9 **DENIED.**

10 3. The matter is **REMANDED** to the Commissioner for additional  
11 proceedings consistent with this Order.

12 4. An application for attorney fees may be filed by separate motion.

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

16 **IT IS SO ORDERED.**

17 DATED June 18, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE