

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

Apr 17, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES G.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:19-CV-03193-LRS

**ORDER GRANTING  
PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT,  
INTER ALIA**

**BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment (ECF No. 11) and the Defendant's Motion For Summary Judgment (ECF No. 12).

**JURISDICTION**

James G., Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on February 26, 2015. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on October 5, 2017, before Administrative Law Judge (ALJ) M.J. Adams. Plaintiff testified at the hearing, as did Vocational Expert (VE), Stephanie Boeshaar. On April 3, 2018, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

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## STATEMENT OF FACTS

1  
2 The facts have been presented in the administrative transcript, the ALJ's  
3 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At  
4 the time of the administrative hearing, Plaintiff was 30 years old. He has an 8<sup>th</sup> grade  
5 education and no past relevant work experience. Plaintiff's alleged disability onset  
6 date is October 17, 2014, on which date he was 28 years old.  
7

## STANDARD OF REVIEW

8  
9 "The [Commissioner's] determination that a claimant is not disabled will be  
10 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*  
11 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere  
12 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less  
13 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);  
14 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.  
15 1988). "It means such relevant evidence as a reasonable mind might accept as  
16 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91  
17 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may  
18 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457  
19 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).  
20 On review, the court considers the record as a whole, not just the evidence supporting  
21 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.  
22 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

23 It is the role of the trier of fact, not this court to resolve conflicts in evidence.  
24 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
25 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749  
26 F.2d 577, 579 (9th Cir. 1984).

27 A decision supported by substantial evidence will still be set aside if the proper  
28

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1 legal standards were not applied in weighing the evidence and making the decision.  
2 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
3 1987).

## 4 5 **ISSUES**

6 Plaintiff argues the ALJ erred in: 1) failing to find he has a "severe" mental  
7 health impairment; 2) failing to find he meets or equals Listing 11.02 for epilepsy; 3)  
8 failing to provide adequate reasons for discounting his symptom testimony; and 4)  
9 failing to provide adequate reasons for discounting medical opinion evidence.

## 10 11 **DISCUSSION**

### 12 **SEQUENTIAL EVALUATION PROCESS**

13 The Social Security Act defines "disability" as the "inability to engage in any  
14 substantial gainful activity by reason of any medically determinable physical or  
15 mental impairment which can be expected to result in death or which has lasted or can  
16 be expected to last for a continuous period of not less than twelve months." 42  
17 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined  
18 to be under a disability only if his impairments are of such severity that the claimant  
19 is not only unable to do his previous work but cannot, considering his age, education  
20 and work experiences, engage in any other substantial gainful work which exists in  
21 the national economy. *Id.*

22 The Commissioner has established a five-step sequential evaluation process for  
23 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,  
24 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if he is engaged  
25 in substantial gainful activities. If he is, benefits are denied. 20 C.F.R. §  
26 416.920(a)(4)(I). If he is not, the decision-maker proceeds to step two, which  
27 determines whether the claimant has a medically severe impairment or combination

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1 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe  
2 impairment or combination of impairments, the disability claim is denied. If the  
3 impairment is severe, the evaluation proceeds to the third step, which compares the  
4 claimant's impairment with a number of listed impairments acknowledged by the  
5 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.  
6 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
7 equals one of the listed impairments, the claimant is conclusively presumed to be  
8 disabled. If the impairment is not one conclusively presumed to be disabling, the  
9 evaluation proceeds to the fourth step which determines whether the impairment  
10 prevents the claimant from performing work he has performed in the past. If the  
11 claimant is able to perform his previous work, he is not disabled. 20 C.F.R. §  
12 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step  
13 in the process determines whether he is able to perform other work in the national  
14 economy in view of his age, education and work experience. 20 C.F.R. §  
15 416.920(a)(4)(v).

16 The initial burden of proof rests upon the claimant to establish a prima facie  
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
18 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
19 mental impairment prevents him from engaging in his previous occupation. The  
20 burden then shifts to the Commissioner to show (1) that the claimant can perform  
21 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
22 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
23 1498 (9th Cir. 1984).

## 24 25 **ALJ'S FINDINGS**

26 The ALJ found the following: 1) Plaintiff has "severe" medical impairments,  
27 those being: right shoulder impairment and seizure disorder; 2) Plaintiff's

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1 impairments do not meet or equal any of the impairments listed in 20 C.F.R. § 404  
2 Subpart P, App. 1; 3) Plaintiff has the residual functional capacity (RFC) to perform  
3 light work as defined in 20 C.F.R. § 416.967(b): he can lift and carry 20 pounds  
4 occasionally and 10 pounds frequently; sit for six hours in an eight hour workday;  
5 stand and walk six hours in an eight hour workday; can do unlimited pushing and  
6 pulling; can frequently climb ramps and stairs; cannot climb ladders, ropes or  
7 scaffolds; can frequently balance, stoop, kneel or crouch; can occasionally crawl; can  
8 occasionally reach overhead with the dominant right upper extremity; has no  
9 limitation in the non-dominant left upper extremity; capable of unlimited handling,  
10 fingering and feeling; should avoid exposure to hazards and heights; and cannot  
11 operate a motor vehicle; and 4) this RFC allows Plaintiff to perform other jobs  
12 existing in significant numbers in the national economy as identified by the VE,  
13 including furniture rental consultant, ironer, tanning salon attendant, and call out  
14 operator. Accordingly, the ALJ concluded Plaintiff has not been disabled at any time  
15 since February 26, 2015.

## 16 17 **PHYSICAL IMPAIRMENTS**

### 18 **A. Right Shoulder Impairment**

19 At the behest of the Commissioner, Plaintiff was examined by Beth Liu, M.D.,  
20 on July 6, 2015. The stated reason for the exam was “seizures; learning disability;  
21 epilepsy.” Plaintiff complained of seizures and recurrent right shoulder dislocation  
22 as a result of the seizures. Plaintiff described having “muscle spasm all day” with his  
23 arm coming out of place when picking up stuff of little weight. (AR at p. 362).  
24 Plaintiff clarified that he suffers from “[d]aily jolts” and his shoulder “keeps popping  
25 out of place even during my sleep.” (*Id.*). Plaintiff reported being able to shop, travel  
26 without a companion, to use standard public transportation, to walk a block at a  
27 reasonable pace on rough or uneven surfaces, to ambulate without using a device, to

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1 use standard public transportation, to climb a few steps at a reasonable pace with the  
2 use of a single hand rail, to care for personal hygiene, to prepare a simple meal and  
3 feed himself, and to sort, handle, and use paper files. (AR at p. 363).

4 Examination of Plaintiff's right shoulder revealed "slight tenderness" with a  
5 range of motion of 95 degrees abduction, 30 degrees adduction, 50 degrees extension,  
6 and 95 degrees flexion. Range of motion in the left shoulder was normal. (AR at p.  
7 364). No muscle spasm was seen during the exam, nor was any significant muscle  
8 atrophy or joint deformity seen on the exam. (*Id.*).

9 Dr. Liu diagnosed the Plaintiff with "[u]ncontrolled grand mal seizure" and  
10 "[r]ecurrent right shoulder dislocation, secondary to grand mal seizure." (AR at p.  
11 364). According to her:

12 Physical exam shows decreased ROM in right shoulder.  
13 Neurological exam finding is grossly normal. His MRI  
14 right shoulder with contrast down on 3/3/2014 showed  
15 Prominent Hill-Sachs defect as well as prominent osseous  
16 Bankart lesion involving the anterior-inferior labrum  
17 associated with the anterior-inferior aspect, with loss of  
18 the normal pear shape. The claimant's conditions are  
19 chronic and ongoing. His seizure is uncontrolled and  
20 his right shoulder disability is permanent. He is on high  
21 doses [of] anti-seizure medications, but it seems [it is]  
22 not working for him. He needs further medication  
23 adjustment by [a] neurologist. The prognosis is fair if  
24 he gets further treatment for his condition.

19 (*Id.*).

20 Dr. Liu opined the following regarding Plaintiff's physical RFC:

21 **Based on [Plaintiff's] current examination today, the medical**  
22 **history reviewed, previous medical records reviewed, and**  
23 **[Plaintiff's] account of his limitations**, he is able to lift or carry  
24 up to 10 lbs occasionally. He has no limitation in sitting, walking,  
25 or standing. He is able to perform most hand activities frequently  
26 except reaching overhead or others which he should perform[]  
27 occasionally. He is able to perform most postural activities  
28 frequently except climbing ladders or scaffolds which he  
should avoid perform[ing]. He may perform crawling occasionally.  
Environmental limitations include unprotected heights, operating  
[a] motor vehicle, and moving mechanical parts. In addition, he  
should avoid . . . working [alone] . . . .

(AR at pp. 364-65)(emphasis added).

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1 The ALJ gave “some weight” to Dr. Liu’s opinion, but “based on the physical  
2 exam results obtained in that exam, which were benign,” found “the [Plaintiff] is  
3 limited to lifting or carrying 20 lbs instead of 10 lbs occasionally.” (AR at p. 22).  
4 The ALJ found the April 2016 “Disability Determination Explanation,  
5 Reconsideration,” in which the State of Washington Disability Determination  
6 Services (DDS) determined Plaintiff could lift and carry 20 pounds occasionally and  
7 10 pounds frequently, was “consistent with the physical exam results and the  
8 [Plaintiff’s] self-reported activities.” (*Id.*). The ALJ accorded “some weight” to the  
9 state agency’s determination of a “light’ RFC when taken “[t]ogether with Dr. Liu’s  
10 opinion that the [Plaintiff] has ‘no limitation in sitting, walking, or standing.’” (*Id.*).  
11 The ALJ observed that the state agency did not identify Plaintiff as having a severe  
12 shoulder impairment and concluded this appeared to be an error because the state  
13 agency determination nonetheless “alludes to a right shoulder dislocation when  
14 limiting overhead reaching to occasional on the right.” (*Id.*).

15 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion  
16 of a licensed treating or examining physician or psychologist is given special weight  
17 because of his/her familiarity with the claimant and his/her condition. If the treating  
18 or examining physician's or psychologist’s opinion is not contradicted, it can be  
19 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725  
20 (9<sup>th</sup> Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the  
21 ALJ may reject the opinion if specific, legitimate reasons that are supported by  
22 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,  
23 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,  
24 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,  
25 1216 (9<sup>th</sup> Cir. 2005). The opinion of a non-examining medical advisor/expert need  
26 not be discounted and may serve as substantial evidence when it is supported by other  
27 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,

28  
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1 53 F.3d 1035, 1041 (9th Cir. 1995).

2 The state agency reconsideration determination concluded Dr. Liu's opinion  
3 relied heavily on Plaintiff's subjective report of his symptoms and limitations and  
4 "the totality of the evidence does not support the opinion." (AR at p. 83). It is,  
5 however, not apparent that Dr. Liu disproportionately relied on Plaintiff's report as  
6 compared to her physical examination of the Plaintiff and her review of Plaintiff's  
7 medical history and previous medical records. Moreover, the state agency  
8 reconsideration determination offered no specific explanation of how "totality of the  
9 evidence" did not support Dr. Liu's opinion.<sup>1</sup> In her decision, the ALJ did not specify  
10 why Dr. Liu's physical exam results were "benign" or how her opinion that he is  
11 limited to lifting or carrying up to 10 pounds occasionally is inconsistent with his  
12 self-reported activities. (AR at p. 22). During the hearing, Plaintiff testified his right  
13 shoulder dislocates when he lifts about 25 pounds (AR at p. 45), but the ALJ did not  
14 cite this testimony as a basis for discounting Plaintiff's testimony or for discounting  
15 Dr. Liu's opinion. This is understandable as the fact Plaintiff's right shoulder  
16 dislocates at 25 pounds is not inconsistent with a restriction to lifting no more than  
17 10 pounds occasionally. The ALJ did not offer "specific and legitimate" reasons for  
18 discounting Dr. Liu's opinion.<sup>2</sup>

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19  
20 <sup>1</sup> Indeed, the state agency reconsideration determination did not list  
21 Plaintiff's right shoulder impairment as a "medically determinable impairment."  
22 (AR at pp. 77-78).

23  
24 <sup>2</sup> The court will assume the state agency reconsideration determination was  
25 from a medical source. It is a reasonable assumption as the court has familiarity  
26 with Paula Lantsberger, M.D., in other cases and will take judicial notice that she  
27



1 Likewise, the ALJ did not offer clear and convincing reasons for discounting  
2 Plaintiff's testimony regarding symptoms and limitations from his right shoulder  
3 impairment. Where, as here, the Plaintiff has produced objective medical evidence  
4 of an underlying impairment that could reasonably give rise to some degree of the  
5 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's  
6 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Garrison*  
7 *v. Colvin*, 759 F.3d 95, 1014 (9<sup>th</sup> Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1137  
8 (9<sup>th</sup> Cir. 2014). Subjective testimony cannot be rejected solely because it is not  
9 corroborated by objective medical findings, but medical evidence is a relevant factor  
10 in determining the severity of a claimant's impairments. *Rollins v. Massanari*, 261  
11 F.3d 853, 857 (9<sup>th</sup> Cir. 2001).

12 Plaintiff's limited work history cited by the ALJ (AR at p. 21) is not a clear and  
13 convincing reason for disputing that he is currently limited to lifting and carrying 10  
14 pounds occasionally as opined by Dr. Liu. As discussed above, the objective medical  
15 evidence relied upon by Dr. Liu supports her opinion and the ALJ did not provide a  
16 specific and legitimate reason for discounting her opinion. Accordingly, the medical  
17 evidence is not a clear and convincing reason to dispute that Plaintiff is limited to  
18 lifting and carrying 10 pounds occasionally. Finally, none of Plaintiff's self-reported  
19 activities as recited by the ALJ - shopping, traveling without a companion, using  
20 public transportation, walking a block, climbing steps, caring for his personal  
21 hygiene, working on cars, riding a bicycle, preparing meals, etc. (AR at pp. 21-22)-  
22 constitute a clear and convincing reason for calling into question that Plaintiff is  
23 limited to lifting and carrying 10 pounds occasionally as opined by Dr. Liu.

24 At the hearing, Plaintiff's counsel asked the VE to assume Plaintiff was limited  
25 to lifting 10 pounds occasionally. The VE testified that even with this limitation,

26 \_\_\_\_\_  
27 is a medical doctor in Spokane.

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1 Plaintiff could perform work as a callout operator which is “sedentary” work.<sup>3</sup>  
2 The VE indicated that 15,000 such jobs existed in the national economy. (AR at pp.  
3 50-52). Plaintiff contends this does not constitute a “significant” number of jobs in  
4 the national economy and therefore, the Commissioner failed to meet his/her Step  
5 Five burden.

6 The Ninth Circuit has never set out a bright-line for what constitutes a  
7 “significant number” of jobs. *Gutierrez v. Commissioner of Social Security*, 740 F.3d  
8 519, 528 (9<sup>th</sup> Cir. 2014). In *Gutierrez*, the circuit found that 25,000 jobs met the  
9 standard, although it presented a “close call.” In doing so, however, it cited an 8<sup>th</sup>  
10 circuit case, *Johnson v. Chater*, 108 F.3d 178, 180 (8<sup>th</sup> Cir. 1997), which found  
11 10,000 jobs met the standard. 740 F.3d at 528-29. At this juncture, the court declines  
12 to declare 15,000 jobs in the national economy to not be a “significant number.”<sup>4</sup> The  
13

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14 <sup>3</sup> “Sedentary” work involves lifting no more than 10 pounds at a time and  
15 occasionally lifting or carrying articles like docket files, ledgers, and small tools.  
16 20 C.F.R. §416.967(a).  
17

18 <sup>4</sup> Using *Gutierrez* as a benchmark, three different district judges in the  
19 District of Oregon have issued rulings regarding what constitutes a “significant  
20 number” of jobs in the national economy. In *Cindy F. v. Berryhill*, 367 F.Supp.2d  
21 1195, 1220 (D. Or. 2019), the court found 7,400 jobs in the national economy did  
22 not constitute a “significant number.” In *Stephanie O. v. Berryhill*, 2019 WL  
23 2713234 at \*7 (D. Or. 2019), the court found 17,408 jobs did constitute a  
24 “significant number.” In *Nikola G. v. Commissioner, Social Security*  
25  
26  
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1 court will not, however, preclude Plaintiff from reasserting this argument should he  
2 be before the court again following further administrative proceedings necessitated  
3 by this court's remand of this matter, as discussed *infra*.

#### 4 5 **B. Epilepsy**

6 The ALJ found that Plaintiff's condition does not meet or equal Listing 11.02  
7 for Epilepsy, concluding "its requirements are not met." (AR at p. 19).

8 The medical record contains a detailed description of Plaintiff's typical seizure  
9 as required by Listing 11.02. Laura L. Hershkowitz, D.O., conducted a four day  
10 continuous EEG monitoring study of the Plaintiff in February 2015. (AR at pp. 591-  
11 93). The ALJ's decision did not refer to this study, instead citing cranial nerve  
12 assessments conducted in February and April 2016, which were within normal limits.  
13 (AR at p. 21)

14 In evaluating the frequency of seizures for the purpose of determining whether  
15 Listing 11.02 is met or equaled, the Commissioner considers "adherence to prescribed  
16 treatment." According to 20 C.F.R. §404 Subpt. P, App. 2, Listing 11.00 H. 4. d.:

17 We do not count seizures that occur during a period when  
18 you are not adhering to prescribed treatment without a good  
19 reason. When we determine that you had good reason for  
20 not adhering to prescribed treatment, we will consider your  
21 physical, mental, educational, and communicative limitations  
22 (including any language barriers). We will consider you to  
23 have good reason for not following prescribed treatment if,  
24 for example, the treatment is very risky for you due to  
25 its consequences or unusual nature, or if you are unable to  
26 afford prescribed treatment that you are willing to accept,  
27 but for which no free community resources are available.

28 The ALJ noted there is evidence indicating Plaintiff has failed to take his anti-  
seizure medications and his medication regimen "seems to be working when

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26 *Administration*, 2019 WL 6114534 at \*5 (D. Or. 2019), the court found 8,657 jobs  
27 did not constitute a "significant number."

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1 compliant” as reported by Richard Sloop, M.D., in September 2017. (AR at p. 21).<sup>5</sup>  
2 Although the ALJ did this in the context of analyzing whether Plaintiff’s symptoms  
3 and limitations are as severe as claimed by him, and not within the framework of  
4 whether Listing 11.02 is met or equaled, this is inconsequential. *Lewis v. Apfel*, 236  
5 F.3d 503, 513 (9<sup>th</sup> Cir. 2001)(ALJ required only to discuss and evaluate evidence that  
6 supports his or her conclusion and does not require the ALJ to do so under a  
7 particular heading).

8 What the ALJ did not analyze, however, is whether there was good cause for  
9 Plaintiff’s non-compliance. The ALJ failed to consider potentially valid reasons why  
10 Plaintiff was not always compliant with his medication regimen. Plaintiff indicated  
11 he needed reminders to take his medication and there is evidence in the record that  
12 he relied upon his girlfriend for treatment (AR at pp. 201, 216 and 582), perhaps in  
13 part because of cognitive limitations. See discussion *infra*. There is also evidence  
14

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15  
16 <sup>5</sup> Plaintiff’s girlfriend told Dr. Sloop in July 2016 that Plaintiff “tends not to  
17 take his meds.” (AR at p. 698). Plaintiff visited the Yakama Indian Health Center  
18 in December 2015 for refill of seizure medications. The doctor ordered Plaintiff  
19 one month of medication and commented it was “[f]airly clear that he is not  
20 remotely adherent to his medication regimen.” (AR at p. 881). There are a  
21 number of other references in the record to Plaintiff not taking his medication  
22 (AR. at pp. 772, 775, 803, 887 and 909). In August 2014, Dr. Hershkowitz  
23 reported there was “an element of difficult [medication] compliance, but this  
24 seems to be better, and he is still having seizures.” (AR at p. 335).  
25  
26  
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1 in the record that Plaintiff's living situation has not been conducive to compliance  
2 (e.g., reliance on others for transportation; living in a van for a period of time;  
3 needing to establish care with providers in new locations). (AR at pp. 42-43, 203,  
4 217, 368, 441, 495, 547, 568, 640, 645 and 650).

5 On remand, it will be necessary for the Commissioner to consider at Step Three  
6 the extent to which Plaintiff's failure to adhere to prescribed treatment has impacted  
7 the frequency of his seizures and whether there was good cause for that failure.<sup>6</sup> The  
8 absence of good cause would be a valid reason for discounting Plaintiff's testimony  
9 about the severity of his symptoms and his limitations.

## 11 **MENTAL IMPAIRMENTS**

12 Although Plaintiff asserted a learning disability in his application for benefits  
13 as acknowledged by the Commissioner in both his initial and reconsideration  
14 evaluation of Plaintiff's claim for disability (AR at p. 55 and p. 70), the  
15 Commissioner did not specifically consider "Intellectual disability" under Listing  
16 12.05. Only "Affective Disorders" under Listing 12.04 was considered.

17 The non-examining state agency psychologists who reviewed the record,  
18 Patricia Kraft, Ph.D., and John F. Robinson, Ph.D., concluded Plaintiff has a non-  
19 severe affective disorder resulting in only "mild" restriction of activities of daily  
20 living, "mild" difficulties in social functioning, "mild" difficulties in maintaining  
21 concentration, persistence or pace, with no repeated episodes of decompensation.

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22  
23 <sup>6</sup> SSR 82-59, rescinded effective October 29, 2018, after the  
24 Commissioner's final decision of April 3, 2018, does not apply as there has not yet  
25 been a determination that Plaintiff's epilepsy is a "disabling impairment" which is  
26 amenable to treatment that could be expected to restore his ability to work.  
27  
28

1 (AR at pp. 60-62; 77-79). The psychologists pointed out that Plaintiff “[a]ppears to  
2 have a cognitive impairment” and observed that his girlfriend said he could not read  
3 or write, but also asserted that “[r]ecords indicate . . . he is able to read and write . .  
4 . he is independent with ADLs [Activities of Daily Living] and handling funds.” (AR  
5 at p. 61 and p. 78).

6 In his decision, the ALJ agreed that Plaintiff’s affective disorder is “non-  
7 severe” because it causes no more than “mild” limitation in any of the functional  
8 areas, citing evidence regarding Plaintiff’s participation in social activities, his  
9 romantic and family relationships, and his independence in performing daily living  
10 activities. (AR at p. 18). The ALJ specifically accorded “some weight” to Dr.  
11 Robinson’s opinion as it was “consistent with the [Plaintiff’s] social activities of  
12 attending birthday parties and community parties . . . while alleging disabling mental  
13 impairments.” (AR at p. 22).

14 On September 14, 2015, Plaintiff underwent a consultative psychological  
15 examination by Amy Ford, Psy. D., at the behest of the Commissioner. Plaintiff  
16 identified seizures and his shoulder impairment as the chief reason for his disability.  
17 (AR at p. 367). Dr. Ford reviewed Plaintiff’s records from Greater Lakes Mental  
18 Health where he was assessed on January 27, 2015, and “given a provisional  
19 diagnosis of Major Depressive Disorder, single episode, moderate.” (AR at p. 313).  
20 The therapist at Greater Lakes Mental Health assigned him a Global Assessment  
21 Functioning (GAF) score of 45 at that time because of “[s]erious problems with  
22 occupational and social functioning; chronically unemployed, problems with  
23 substance abuse.” Defendant was discharged from Greater Lakes Mental Health on  
24 February 10, 2015, when he failed to return for a session with the therapist following  
25 the intake assessment on January 27. (AR at p. 317).

26 Plaintiff told Dr. Ford he left school in 9<sup>th</sup> grade, that school was hard for him,  
27 he struggled with spelling and reading, and he was in special education. (AR at p.  
28

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1 368). Plaintiff was unable to answer certain questions posed by Dr. Ford, leading her  
2 to conclude “[h]is fund of knowledge was fair to poor and his IQ is estimated to be  
3 below average based on educational history.” (AR at p. 369). Plaintiff was unable  
4 to do Serial 7s and Serial 3s, and he could not spell the words “World” or “Girl.” Dr.  
5 Ford concluded his concentration “appears poor.” (*Id.*). Plaintiff told Dr. Ford he did  
6 not know what he would do if he were in a crowded movie theater and was the first  
7 one to see smoke and fire. Dr. Ford concluded Plaintiff’s “judgment is impaired by  
8 low intelligence and low interest in life.” (*Id.*).

9 Plaintiff described his mood as depressed and Dr. Ford wrote that he was  
10 “actively suicidal.” (AR at p. 369). Plaintiff indicated he experiences visual and  
11 auditory hallucinations. (*Id.*). Plaintiff described his daily living activities as  
12 including cleaning up, doing the dishes, cleaning around the house, making meals and  
13 “breakfast for everyone.” (AR at p. 370). He watches television and visits with  
14 family and friends. (*Id.*). He stated he enjoys being with his girlfriend’s kids and  
15 visiting with her father and brother. (*Id.*).

16 Dr. Ford diagnosed the Plaintiff with “Major Depressive Disorder, Moderate  
17 to Severe (actively suicidal).” Dr. Ford indicated that Plaintiff had been “struggling  
18 with . . . depressive disorder for several years with limited treatment.” (AR at p. 370).  
19 She opined that he needed more routine mental health care and to adhere to . . .  
20 recommendations for routine treatment.” (*Id.*). She opined that his ability to reason  
21 “is fair but limited” by his educational level; his understanding and memory “is  
22 impaired and fair to poor;” his ability to sustain concentration and persistence “is  
23 impaired due to chronic pain and depression;” his ability to interact socially “is  
24 limited by his pain and interest in life;” and his ability to adapt and be flexible “is  
25 limited by his pain and hopelessness.” (*Id.*). Dr. Ford stated to please let her know  
26 if she could provide any further information (*Id.*), but the Commissioner did not take  
27 her up on that offer.

28  
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1 The ALJ accorded “very limited weight” to Dr. Ford’s opinions because she  
2 did not opine that Plaintiff “has specific vocational limitations resulting from the  
3 ‘impaired’ abilities.” (AR at p. 22). The ALJ wrote “[t]here are many jobs in the  
4 national economy that could still be performed with ‘fair to poor’ understanding and  
5 memory and ‘impaired’ concentration and persistence” (AR at p. 22), although such  
6 limitations were never presented to the VE in hypothetical questioning. The ALJ  
7 further wrote that Plaintiff had “retained sufficient concentration and persistence to  
8 work on cars, make breakfast for ‘everyone’ in his household . . . as well as attend  
9 birthday parties and community parties . . . .” (AR at pp. 22-23).

10 A “severe” impairment is one which significantly limits physical or mental  
11 ability to do basic work-related activities. 20 C.F.R. § 416.920(c). It must result  
12 from anatomical, physiological, or psychological abnormalities which can be shown  
13 by medically acceptable clinical and laboratory diagnostic techniques. It must be  
14 established by medical evidence consisting of signs, symptoms, and laboratory  
15 findings, not just the claimant's statement of symptoms. 20 C.F.R. § 416.921.

16 Step two is a *de minimis* inquiry designed to weed out non-meritorious claims  
17 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d  
18 1273, 1290 (9<sup>th</sup> Cir. 1996), citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)  
19 (“[S]tep two inquiry is a *de minimis* screening device to dispose of groundless  
20 claims”). “[O]nly those claimants with slight abnormalities that do not significantly  
21 limit any basic work activity can be denied benefits” at step two. *Bowen*, 482 U.S.  
22 at 158 (concurring opinion). “Basic work activities” are the abilities and aptitudes to  
23 do most jobs, including: 1) physical functions such as walking, standing, sitting,  
24 lifting, pushing, pulling, reaching, carrying, or handling; 2) capacities for seeing,  
25 hearing, and speaking; 3) understanding, carrying out, and remembering simple  
26 instructions; 4) use of judgment; 5) responding appropriately to supervision, co-  
27 workers and usual work situations; and 6) dealing with changes in a routine work

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MOTION FOR SUMMARY JUDGMENT- 16**



1 setting. 20 C.F.R. § 416.922(b).

2 The Commissioner has stated that “[i]f an adjudicator is unable to determine  
3 clearly the effect of an impairment or combination of impairments on the individual’s  
4 ability to do basic work activities, the sequential evaluation should not end with the  
5 not severe evaluation step.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9<sup>th</sup> Cir. 2005),  
6 citing S.S.R. No. 85-28 (1985). An ALJ may find that a claimant lacks a medically  
7 severe impairment or combination of impairments only when his conclusion is  
8 “clearly established by medical evidence.” *Id.*

9 The ALJ did not consider whether Plaintiff had a medically determinable  
10 learning disability, let alone whether medical evidence clearly establishes it to be  
11 “severe.” While Dr. Ford did not include a learning disability as part of her  
12 diagnosis, the functional limitations opined by her suggested such a condition existed  
13 and had consequences for Plaintiff’s ability to work.<sup>7</sup> Plaintiff alleged learning  
14 disability as an impairment and therefore, the ALJ had a duty to develop the medical  
15 evidence regarding this impairment, particularly in light of Dr. Ford’s report.

16 The ALJ has a basic duty to inform himself about facts relevant to his decision.  
17 *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983). The ALJ’s duty  
18 to develop the record exists even when the claimant is represented by counsel.  
19 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001). The duty is triggered by  
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21 <sup>7</sup> Dr. Ford is not the only one to suggest the existence of a learning disorder.

22  
23 (August 1, 2012 provisional diagnosis of Learning Disorder NOS by Dana  
24 Harmon, Ph.D. at AR, p. 662; August 29, 2014 and February 2, 2015 notes from  
25 Dr. Hershkowitz , AR, pp. 335 and 582; March 15, 2015 learning difficulty  
26 diagnosis by J. Scott Taylor, M.D. at AR, p. 572).

27  
28 **ORDER GRANTING PLAINTIFF’S**  
**MOTION FOR SUMMARY JUDGMENT- 17**

1 ambiguous or inadequate evidence in the record and a specific finding of ambiguity  
2 or inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d 881, 885 (9<sup>th</sup>  
3 Cir. 2011).

4 The ALJ also had a duty to develop the medical evidence to ascertain the  
5 “severity” of Plaintiff’s affective disorder (depression). The medical evidence is  
6 extremely sparse in this regard and so it was incumbent upon the ALJ to follow up  
7 with Dr. Ford or another psychologist regarding the extent of Plaintiff’s limitations  
8 from his affective disorder, rather than simply accepting the opinions of the non-  
9 examining psychologists that Plaintiff had no more than “mild” limitations in any  
10 functional area. It was not a legitimate reason to discount Dr. Ford’s opinion because  
11 she was not more specific regarding Plaintiff’s vocational limitations. Nor was it a  
12 legitimate reason to discount her opinion because the Plaintiff indicated he performed  
13 certain activities around his house and engaged in certain social activities with family  
14 and friends. These activities do not necessarily mean his mental functional  
15 limitations are no more than “mild,” particularly in a workplace environment which  
16 is the relevant question. An impairment is not severe “if it does not significantly limit  
17 . . . physical or mental ability to do **basic work activities.**” 20 C.F.R. §416.922(a).  
18 (Emphasis added).

19 If Plaintiff suffers from a “severe” mental impairment, it certainly was not a  
20 harmless error, considering the ALJ found Plaintiff suffered from only “severe”  
21 physical impairments and did not present any mental limitations to the VE during  
22 hypothetical questioning.

## 23 24 **REMAND**

25 Social security cases are subject to the ordinary remand rule which is that when  
26 “the record before the agency does not support the agency action, . . . the agency has  
27 not considered all the relevant factors, or . . . the reviewing court simply cannot

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MOTION FOR SUMMARY JUDGMENT- 18**

1 evaluate the challenged agency action on the basis of the record before it, the proper  
2 course, except in rare circumstances, is to remand to the agency for additional  
3 investigation or explanation.” *Treichler v. Commissioner of Social Security*  
4 *Administration*, 775 F.3d 1090, 1099 (9<sup>th</sup> Cir. 2014), quoting *Fla. Power & Light Co.*  
5 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

6 In “rare circumstances,” the court may reverse and remand for an immediate  
7 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).  
8 Three elements must be satisfied in order to justify such a remand. The first element  
9 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting  
10 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting  
11 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9<sup>th</sup> Cir. 2014). If the ALJ has so erred, the  
12 second element is whether there are “outstanding issues that must be resolved before  
13 a determination of disability can be made,” and whether further administrative  
14 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,  
15 887 (9<sup>th</sup> Cir. 2004). “Where there is conflicting evidence, and not all essential factual  
16 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*  
17 Finally, if it is concluded that no outstanding issues remain and further proceedings  
18 would not be useful, the court may find the relevant testimony credible as a matter of  
19 law and then determine whether the record, taken as a whole, leaves “not the slightest  
20 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*  
21 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-  
22 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are  
23 no outstanding issues that must be resolved, and there is no question the claimant is  
24 disabled- the court has discretion to depart from the ordinary remand rule and remand  
25 for an immediate award of benefits. *Id.* But even when those “rare circumstances”  
26 exist, “[t]he decision whether to remand a case for additional evidence or simply to  
27 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*

28  
**ORDER GRANTING PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT- 19**

1 *Sullivan*, 876 F.2d 683, 689 (9<sup>th</sup> Cir. 1989).

2 The ALJ failed to offer legally sufficient reasons for rejecting Dr. Liu’s opinion  
3 that Plaintiff is limited to lifting and carrying 10 pounds occasionally as a result of  
4 his right shoulder impairment. The ALJ erred in not analyzing whether there was  
5 good cause for Plaintiff’s non-compliance with his medication regimen which is  
6 relevant to the determination of whether Plaintiff’s epilepsy meets or equals Listing  
7 11.02. Finally, the ALJ erred in failing to consider Plaintiff’s alleged learning  
8 disability impairment.

9 There are outstanding issues that must be resolved before a determination of  
10 disability can be made and further administrative proceedings would be useful in  
11 resolving those issues. The ALJ will need to determine the frequency of Plaintiff’s  
12 seizures. This will require revisiting the record, in particular the EEG testing  
13 performed by Dr. Hershkowitz which the ALJ did not address. The ALJ may deem  
14 it necessary to enlist the services of a medical expert (ME) to assist in the inquiry  
15 regarding the frequency of seizures and the impact of medication non-compliance.  
16 The ALJ will then need to analyze and determine whether there was good cause for  
17 Plaintiff’s non-compliance with his anti-seizure medication regimen. Related to that  
18 issue is the need for the ALJ to order another consultative psychological examination  
19 of the Plaintiff, to include intellectual testing to determine whether Plaintiff has a  
20 learning disability impairment and if so, whether it is “severe” and the extent to which  
21 it limits the Plaintiff’s mental RFC. This additional consultative psychological  
22 examination should also be for the purpose of ascertaining the “severity” of Plaintiff’s  
23 affective disorder and resulting limitations.

24 With regard to Plaintiff’s physical RFC, the record establishes Plaintiff is  
25 limited to lifting and carrying 10 pounds occasionally and therefore, any additional  
26 questioning of a VE should include that lifting and carrying capacity as a given.

27 The extent to which Plaintiff’s testimony about symptoms and/or limitations  
28

**ORDER GRANTING PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT- 20**

1 arising from his epilepsy, affective disorders and any learning disability is supported  
2 by the record, remains an open question on remand.

3  
4 **CONCLUSION**

5 Plaintiff's Motion For Summary Judgment (ECF No. 11) is **GRANTED** and  
6 Defendant's Motion For Summary Judgment (ECF No. 12) is **DENIED**.

7 Pursuant to sentence four of 42 U.S.C. §405(g), the Commissioner's decision  
8 is **REVERSED** and **REMANDED** for further administrative proceedings consistent  
9 with this order.

10 **IT IS SO ORDERED.** The District Executive shall enter judgment  
11 accordingly, forward copies of the judgment and this order to counsel of record, and  
12 **close the case.**

13 **DATED** this 17th day of April, 2020.

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17 LONNY R. SUKO  
18 Senior United States District Judge  
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