

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

Jun 18, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALBERTO C.V.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 1:19-CV-03208-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
CROSS-MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 10, and Defendant's Cross-Motion for Summary Judgment, ECF No. 11. The motions were heard without oral argument. Plaintiff is represented by Nicholas Jordan, and Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney L. Jamala Edwards.

For the reasons set forth below, the Court grants Plaintiff's motion, denies Defendant's motion, reverses the administrative law judge ("ALJ) decision denying disability benefits, and remands the case for the immediate calculation and award of benefits.

Jurisdiction

On October 28, 2015, Plaintiff filed a Title II application for disability insurance benefits. Plaintiff alleges an onset date of February 24, 2014.

Plaintiff's application was denied initially and on reconsideration. On October 23, 2017, Plaintiff appeared and testified at a hearing held in Yakima,

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S CROSS-MOTION FOR
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1 Washington before an ALJ. Kim Mullinax also participated as a vocational expert.
2 Plaintiff was represented by Nicholas D. Jordan.

3 The ALJ issued a decision on May 22, 2018, finding that Plaintiff was not
4 disabled. Plaintiff timely requested review by the Appeals Council, which denied
5 the request on July 24, 2019. The Appeals Council's denial of review makes the
6 ALJ's decision the final decision of the Commissioner.

7 Plaintiff filed a timely appeal with the United States District Court for the
8 Eastern District of Washington on September 9, 2019. The matter is before this
9 Court under 42 U.S.C. § 405(g).

10 Sequential Evaluation Process

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

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
22 *Yuckert*, 482 U.S. 137, 140-42 (1987).

23 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
24 § 404.1520(b). Substantial gainful activity is work done for pay and requires
25 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,
26 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are
27 denied. 20 C.F.R. § 404.1520(b). If he is not, the ALJ proceeds to step two.

28 //

1 Step 2: Does the claimant have a medically-severe impairment or
2 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
3 have a severe impairment or combination of impairments, the disability claim is
4 denied. A severe impairment is one that lasted or must be expected to last for at
5 least 12 months and must be proven through objective medical evidence. 20 C.F.R.
6 § 404.1509. If the impairment is severe, the evaluation proceeds to the third step.

7 Step 3: Does the claimant's impairment meet or equal one of the listed
8 impairments acknowledged by the Commissioner to be so severe as to preclude
9 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.
10 App. 1. If the impairment meets or equals one of the listed impairments, the
11 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
12 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

13 Before considering Step 4, the ALJ must first determine the claimant's
14 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual
15 functional capacity is his ability to do physical and mental work activities on a
16 sustained basis despite limitations from his impairments.

17 Step 4: Does the impairment prevent the claimant from performing work he
18 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to
19 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform
20 this work, the evaluation proceeds to the fifth and final step.

21 Step 5: Is the claimant able to perform other work in the national economy
22 in view of his age, education, and work experience? 20 C.F.R. § 404.1520(g).

23 The initial burden of proof rests upon the claimant to establish a prima facie
24 case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098
25 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
26 mental impairment prevents him from engaging in his previous occupation. *Id.* At
27 step five, the burden shifts to the Commissioner to show that the claimant can
28 perform other substantial gainful activity. *Id.*

1 **Standard of Review**

2 The Commissioner’s determination will be set aside only when the ALJ’s
3 findings are based on legal error or are not supported by substantial evidence in
4 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
5 (citing 42 U.S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”
6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”
7 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
8 evidence is “such relevant evidence as a reasonable mind might accept as
9 adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must
10 uphold the ALJ’s denial of benefits if the evidence is susceptible to more than one
11 rational interpretation, one of which supports the decision of the administrative
12 law judge. *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court
13 reviews the entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). “If
14 the evidence can support either outcome, the court may not substitute its judgment
15 for that of the ALJ.” *Matney*, 981 F.2d at 1019.

16 A decision supported by substantial evidence will be set aside if the proper
17 legal standards were not applied in weighing the evidence and making the
18 decision. *Brawner v. Sec’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th
19 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
20 immaterial to the ultimate nondisability determination. *Stout v. Comm’r, Soc. Sec.*
21 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

22 **Statement of Facts**

23 The facts have been presented in the administrative transcript, the ALJ’s
24 decision, and the briefs to this Court; only the most relevant facts are summarized
25 here. At the time of the hearing, Defendant was 43 years old. He attended school
26 through the 8th grade in Mexico. He cannot read or speak English.

27 In 2011, Plaintiff fell off a ladder while picking pears and injured his left
28 side. He injured his left neck, shoulder, hip and knee. He had abrasions, swelling

1 and lacerations on his left side because the ladder fell on top of him. He had x-
2 rays of his left knee, but no MRI. Washington State Department of Labor &
3 Industries closed the claim in 2011. He continued to work, although his left knee
4 still bothered him. He then injured his right knee at work in late April 2013. He
5 was pushing a cart loaded with products. The wheel of the cart got caught on
6 something, causing his knee to collide with the cart. An x-ray of his knee was
7 done, but there was no detectable abnormality. He was sent to physical therapy.
8 By June 2013, his knee was getting worse rather than improving and an MRI was
9 conducted. He was diagnosed with right knee impact injury, resulting in
10 microfracture and extensive bone swelling and fluid collections. He was placed on
11 work restrictions, with occasional standing and walking for only 1 to 3 hours a
12 day. Plaintiff's pain escalated with his return to work, so he was given a brace and
13 was kept off from work. He continued to complain of popping and pain in his
14 right knee.

15 In August 2013, he was released to sedentary work for one month. Plaintiff
16 continued to participate in physical therapy. By October 2013, Plaintiff was
17 walking without the use of crutches or any other device and the swelling was
18 much reduced. His active range of motion as normal, although Plaintiff was still
19 complaining of pain in his right knee.

20 In November 2013, Plaintiff saw Dr. Seltzer. AR 616. He had a limping gait,
21 could not stand on his heels or toes and was not asked to perform a squat because
22 it was too painful for him. Dr. Selzer reviewed the MRI and did not find any
23 evidence of ligament detachments but thought there may be possible edema in the
24 marrow and possible bone bruise. There were no obvious signs of detachment or
25 chondral surfaces or loose bodies within the joint. He noticed mild effusion and
26 swelling. He recommended a follow-up MRI of the right knee.

27 An MRI scan was conducted in December 2013, which was compared to
28 the one done in June 2013. AR 614. It showed a full-thickness cartilage defect

1 along the medial femoral condyle at the site of bone marrow edema and a
2 subchondral sclerosis and cartilage irregularity, with prominent bone marrow
3 edema. Dr. Selzer concluded Plaintiff's condition had worsened and he was
4 referred to an orthopedic doctor.

5 Dr. Greenwald performed a right knee arthroscopy, arthroscopic removal of
6 loose bodies, arthroscopic synovectomy, arthroscopic microfracture and
7 chondroplasty of medial femoral condyle, and open arthrotomy with cartilage
8 allograft on February 24, 2014. Dr. Greenwald continued to see Plaintiff for
9 follow-up care. In June 2014, he noted that Plaintiff had no improvement from the
10 surgery on his right knee. AR 304. In September 2014, Plaintiff received three
11 Synvisc injections in his right knee because he was still in pain. He was walking
12 uncomfortably and very stiffly with assistance from a cane. AR 307. In October
13 2014, Plaintiff reported his knee pain had improved, but he continued to have
14 episodes of intermittent swelling if he stood too long. AR 313. Dr. Greenwald
15 indicated that he did not believe Plaintiff would be able to return to his job as his
16 knee endurance was limited. AR 313.

17 In September 2014, Dr. Hopp, an orthopedist, examined Plaintiff because
18 Plaintiff was complaining of pain in his left knee. He opined that, on a more
19 probable than not basis, Plaintiff's left knee was injured when he fell in 2011 and
20 that it had been aggravated by forced overuse following his right knee problems.
21 AR 640. He recommended reopening Plaintiff's L & I claim for the ladder injury.

22 Plaintiff was evaluated by Dr. Schmick and Dr. Fossier in December 2014.
23 AR 324. Plaintiff completed a symptom diagram and made markings over the
24 anterior and posterior surfaces of both knees. He explained that the marks indicate
25 sharp pain when he walks, and that sometimes even at rest, he will experience
26 throbbing pain in his knees. AR 325. Dr. Schmick and Fossier diagnosed a right
27 knee sprain, right knee chondromalacia, right knee tendinitis, and right knee
28 posttraumatic arthritis. Dr. Schmick and Dr. Fossier were asked if Plaintiff's left

1 knee pain or strain was causally related to the April 30, 2013 injury. They
2 indicated they did not believe that the alleged overuse of the left knee was caused
3 by the right knee injury. They noted that Plaintiff's right knee evidenced a 19%
4 lower extremity impairment. They indicated that Plaintiff could sit for six hours
5 and stand and work for two hours at one time. AR 645.

6 In January 2015, ARNP Clark released Plaintiff to two jobs, with
7 modifications that he must have sitting breaks every two hours, and as needed
8 when standing or walking, on a permanent basis.

9 Dr. Greenwald saw Plaintiff in April 2015 for his right knee. AR 315. At
10 that time Plaintiff rated the pain severity as an 8 out of 10. Plaintiff reported that
11 his pain was aggravated by climbing and descending stairs, movement, sitting,
12 walking, and standing. He experienced decreased mobility, difficulty initiating
13 sleep, joint tenderness, limping, nocturnal pain, numbness and swelling. He
14 explained that the pain radiates on the back of his leg, he has back pain, and
15 numbness in the entire front of his right leg. He was limping when he walked. He
16 reported the right leg pains had been getting worse in the last year. Dr. Greenwald
17 diagnosed arthritis knee, posttraumatic. He assessed Plaintiff's symptoms to be
18 due to a thoracic or lumbosacral neuritis. He believed that Plaintiff's residual knee
19 pain and swelling were going to persist. He noted Plaintiff had numbness
20 involving the left knee on the front of his leg, with sciatic irritation on the right,
21 causing limping.

22 Another MRI was done in June 2015. AR 479. Irregularity in the articular
23 cartilage of the medial femoral condyle was seen. There was still some minimal
24 underlying edema in the medial femoral condyle. Plaintiff reported pain in both
25 knees.

26 An MRI scan of Plaintiff's left knee was done in September 2015. It was
27 reported to be negative. His treatment provider stated that Plaintiff was unable to
28 return to his job due to his injury.

1 On September 21, 2015, Dr. Seltzer wrote to the Board of Industrial
2 Insurance Appeals stating that he could find no objective evidence that Plaintiff
3 had sustained an injury and aggravation to his left knee. AR 479.

4 Plaintiff saw Dr. Lindstrom in November 2015. He complained of pain in
5 both knees. He reported that his left great toe goes numb. On November 10, 2015,
6 an ARNP from Yakima Worker Care stated that Plaintiff was at maximum
7 medical improvement and it was okay to close the claim related to Plaintiff's right
8 knee. He was seen in January 2016. He stated he continued to have pain and
9 difficulty walking with his right knee. He limped, favoring his right knee.

10 Plaintiff's original claim as a result of falling off the ladder in 2011 was
11 reopened after he was diagnosed with internal derangement of his left knee and a
12 labral tear in his left hip.

13 In March 2016, a medical evaluation was conducted by Dr. Thomas Gritza,
14 Orthopedist. AR 469. At that time, Plaintiff complained of bilateral anterior knee
15 pain and numbness on the left side. He described the pain as burning, stabbing and
16 aching. He reported that with regard to his right knee, when he gets up in the
17 morning, he notices some crepitus or popping in his right knee. As the day goes
18 on, his right knee pain worsens, and the right knee swells. He uses a cane and
19 limps because his right knee hurts. He also indicated that when he does a lot of
20 walking, it seems like his right knee locks up.

21 With regard to the left knee, Plaintiff indicated that his pain is primarily on
22 the lateral side of the left femoral condyle, and also his left patellar tendon. He
23 states his left knee swells a little. While he has pain, he does not limp on the left
24 side. He reported that he has difficulty climbing and descending stairs.

25 Upon examination, both his right and left knees appeared slightly swollen
26 and he stood with both knees slightly flexed. He walked with an asymmetric gait,
27 limping on the right. He was unable to walk on his tiptoes due to pain and
28 declined to walk on his heels, explaining that to do so caused a needle-like

1 sensation on the right side. He could not perform a deep knee bend or squat and
2 would not jog in place. He could not perform a simulated cutting maneuver.

3 His range of motion of the right knee was 0 degrees to 130 degrees of
4 flexion. Range of motion of the left knee was 0 degrees to 110 degrees, which is
5 marginally normal, given that 110 degrees is the cutoff for knee impairment.
6 When the anterior and posterior drawer signs were done, an audible or palpable
7 click or pop emitted from his right knee. He stated that this audible crepitus was
8 followed by significant pain. He reported that it felt like something was moving
9 inside. Anterior and posterior drawer signs were negative in the left knee. Dr.
10 Gritzka recommended that Plaintiff be seen by Dr. Greenwald for a “second look”
11 arthroscopic procedures because the cartilage matrix implant may be loose or may
12 have a loose flap or mobile component that is causing the clicking and popping.
13 He noted that at the time the procedure was completed it was considered “cutting
14 edge” but it has now essentially vanished from the orthopedic surgical
15 armamentarium as an unsuccessful procedure. In his Addendum, Dr. Gritzka
16 noted that standing x-rays of Plaintiff’s right knee show slight narrowing of the
17 medial compartment of the right knee, which is consistent with a partial failure of
18 the cartilage restoration procedure. AR 509.

19 Dr. Gritzka tested Plaintiff’s left hip, which caused lower back and posterior
20 hip area pain and produced pain on the lateral aspect of Plaintiff’s left knee. Dr.
21 Gritzka concluded that Plaintiff had left femoroacetabular impingement syndrome,
22 or an internal derangement of the left knee and possibly left hip.

23 In April 2016, a lumbar MRI scan was completed. It demonstrated a
24 bulging disk at L4-L5 combining with facet arthrosis. It also showed a 1.1 cm
25 ovoid mass in the L4 vertebral body of indeterminate nature.

26 Dr. Greenwald saw Plaintiff in June 2016. At that time, Plaintiff had
27 numbness on both sides of his knee, bilateral tenderness, and pain. Dr. Greenwald
28

1 indicated that his hip joint exam was completely benign and he recommended
2 conservative care for his back.

3 In July 2016 Dr. Gritzka updated to his evaluation. AR663. He continued to
4 believe that Plaintiff could not perform his job as a gel coater/painter due to the
5 internal derangements of both his knees and his left hip and back pain.

6 Plaintiff continued to have left hip pain and pain in his back and saw Dr.
7 Hansen in December 2016. AR 678. He continued to walk with a limp and have
8 difficulty going up and down stairs and hills. He reported that pain medicine did
9 not help much, and sometimes not at all.

10 In February 2017, Dr. Lynch examined Plaintiff and diagnosed a possible
11 labral tear and suggested hip arthroscopy. AR 682. Plaintiff had surgery on his left
12 hip in May 2017 including a diagnostic arthroscopy, debridement of the labral tear
13 and a limited arthroscopic synovectomy of the left hip. Dr. Lynch concluded that
14 both the lumbar and left hip abnormalities were consistent with a fall onto the left
15 side and either could cause the referred pain to the left knee. Plaintiff began
16 physical therapy in June 2017.

17 Plaintiff went to the emergency room in July 2017 complaining of chronic
18 right knee pain. He stated that it felt like something was moving around inside the
19 joint. He had full range of motion, and no appreciable swelling. He was advised
20 that his symptoms may be related to physical therapy and increased use of the
21 knee. He also had x-rays of his right knee and they Images of his right knee
22 revealed no identifiable acute osseous injury or significant arthritic changes.

23 Notably, Plaintiff was seen at the Yakima Worker Care PLLC monthly
24 from September 2014 to August 2017. He consistently stated that he had pain and
25 difficulty walking with his right knee. He also complained of back pain and left
26 knee pain. He limped, favoring his right knee. He consistently had reduced range
27 of motion and swelling. AR 402-426, 445-462, 699-746, 705-746. Plaintiff's
28 treatment providers consistently recognized employment restrictions that

1 prevented Plaintiff from returning to full employment. Plaintiff has not returned to
2 work full time since his injury in 2013.

3 His last Activity Prescription Form in the record was completed in August
4 2017. AR 746. Plaintiff was not released to work at that time. He had significant
5 restrictions, including seldom (0-1 hours) stand/walk, climb stairs, bend/stoop,
6 and squat/kneel. He was never to perform work from ladder, climb a ladder or
7 crawl.

8 **The ALJ's Findings**

9 The ALJ found that Plaintiff met the insured status requirements of the
10 Social Security Act through September 30, 2019. AR 17.

11 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
12 activity since February 24, 2014. AR 18.

13 At step two, the ALJ found Plaintiff has the following severe impairments:
14 right knee posttraumatic arthritis with chondromalacia; tendinitis status-post
15 surgery; obesity; lumbar spine facet arthrosis; left hip mild synovitis; and labral
16 tear status-post surgery. AR 18.

17 At step three, the ALJ found Plaintiff's impairments or combination of
18 impairments do not meet or medically equal any Listing. AR 21.

19 The ALJ concluded Plaintiff has the residual functional capacity to perform
20 light work as defined in 20 CFR 404.1567(b) except that Plaintiff can stand or
21 walk for 4 hours out of 8 hours; sit for 6 hours out of 8 hours; occasionally climb
22 ramps and stairs; occasionally climb ladders, ropes, and scaffolds, frequently
23 balance and stoop; occasionally kneel, crouch, and crawl; and he must avoid
24 concentrated exposure to extreme cold, wetness, vibration, and hazards, such as
25 moving machinery and unprotected heights. AR 22.

26 At step four, the ALJ found that Plaintiff is unable to perform any
27 past relevant work. AR 29.

28 At step five, the ALJ found Plaintiff was not disabled on the basis that he

1 could perform other work which exists in significant numbers in the national
2 economy, including positions such as assembler, production; cashier II, and
3 storage facility rental clerk. AR 32.

4 **Issues for Review**

- 5 1. Whether the ALJ properly assessed Plaintiff's statements concerning the
6 intensity, persistence and limiting effects of his symptoms?
- 7 2. Whether the ALJ properly assessed the opinions of Plaintiff's treating and
8 examining doctors?
- 9 3. Whether the ALJ properly determined Plaintiff's residual functional
10 capacity?

11 **Discussion**

12 1. *Whether the ALJ properly assessed Plaintiff's concerning the*
13 *intensity, persistence and limiting effects of his symptoms?*

14 The ALJ found that while Plaintiff's medically determinable impairments
15 could reasonably be expected to cause the alleged symptoms, Plaintiff's
16 statements concerning the intensity, persistence and limiting effects of these
17 symptoms were not entirely consistent with the medical evidence and other
18 evidence in the record. Specifically, the ALJ noted that Plaintiff's treatment notes
19 in the record do not sustain Plaintiff's allegations of disabling pain and limitation.
20 The ALJ concluded that while Plaintiff experiences some level of pain and
21 limitations, it is only to the extent described in the residual functional capacity
22 (RFC).

23 Plaintiff argues the ALJ failed to provide specific, clear, and convincing
24 reasons for rejecting his symptom testimony. Plaintiff argues that it is not enough
25 for the ALJ to opine that his medical records do not support the level of limitation
26 arising from his impairments. He maintains his stated daily activities and
27 treatment history corroborate his testimony regarding the intensity of his
28 symptoms. For example, he testified that he is unable to attend church because he

1 cannot sit stationary for very long without needing to stretch through the service.
2 He needs to lay down to ease the pain in his hip and lift his leg up while sitting to
3 relieve the pain in his right knee.

4 An ALJ engages in a two-step analysis to determine whether to discount a
5 claimant's testimony regarding subjective symptoms. SSR 16-3p, 2017 WL
6 5180304. At Step 1, the ALJ determines whether the claimant has a medically
7 determinable impairment (MDI) that could reasonably be expected to produce the
8 individual's alleged symptoms. *Id.* At Step 2, the ALJ evaluates the intensity and
9 persistence of an individual's symptoms such as pain and determines the extent to
10 which an individual's symptoms limit his or her ability to perform work-related
11 activities. *Id.* In considering the intensity, persistence, and limiting effects of an
12 individual's symptoms, the ALJ examines the entire case record, including the
13 objective medical evidence, the claimant's statements about the intensity,
14 persistence, and limiting effects of symptoms, statements and other information
15 provided by medical sources and other persons and any other relevant evidence in
16 the claimant's case record. *Id.*

17 If the claimant meets the first step and there is no evidence of malingering,
18 "the ALJ can only reject the claimant's testimony about the severity of the
19 symptoms if [the ALJ] gives 'specific, clear, and convincing reasons' for the
20 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
21 omitted). General findings are insufficient; rather, the ALJ must identify what
22 symptom claims are being discounted and what evidence undermines these claims.
23 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
24 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
25 explain why it discounted claimant's symptom claims). "The clear and convincing
26 [evidence] standard is the most demanding required in Social Security cases."
27 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
28 *Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

1 Factors to be considered in evaluation the intensity, persistence, and
2 limiting effects of a claimant's symptoms include: 1) daily activities; 2) the
3 location, duration, frequency, and intensity of pain or other symptoms; 3) factors
4 that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness,
5 and side effects of any medication an individual takes or has taken to alleviate
6 pain or other symptoms; 5) treatment, other than medication, an individual
7 receives or has received for relief of pain or other symptoms; 6) any measures
8 other than treatment an individual uses or has used to relieve pain or other
9 symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every
10 hour, or sleeping on a board); and 7) any other factors concerning an individual's
11 functional limitations and restrictions due to pain or other symptoms. SSR16-3p,
12 2017 WL 5180304; 20 C.F.R. §§ 404.1529(c)(3).

13 Daily activities may be grounds for an adverse credibility finding if (1)
14 Plaintiff's activities contradict his other testimony, or (2) Plaintiff "is able to
15 spend a substantial part of his day engaged in pursuits involving the performance
16 of physical functions that are transferable to a work setting." *Orn v. Astrue*, 495
17 F.3d 635, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
18 1989))

19 The ALJ discounted Plaintiff's statements as not being entirely consistent
20 with the medical evidence and other evidence in the record and also stated the
21 evidence cannot be fully reconciled with the level of pain and limiting effects of
22 the impairments that Plaintiff has alleged. In making those conclusions, however,
23 the ALJ simply reviewed the evidence in the record but never identified any
24 inconsistencies or how the evidence cannot be reconciled with Plaintiff's pain
25 level. If the ALJ had delved deeper into the medical record, the ALJ would have
26 noted a failed medical procedure. Dr. Greenwald attempted to regrow cartilage in
27 Plaintiff's knee, a procedure that Dr. Gritzka indicated was now no longer used.
28 Dr. Gritzka recommended that additional surgery may be needed to correct

1 Plaintiff's right knee, but this was never done. Notably, the ALJ fails to mention
2 or address this failed medical procedure and fails to address whether this failed
3 medical procedure can account for Plaintiff's debilitating pain.

4 No medical provider ever indicated that Plaintiff was not suffering pain in
5 his right knee. Rather, the record is fairly consistent that when Plaintiff went to his
6 monthly appointments at the Workers Care, he had pain, swelling, limited range
7 of motion, and he walked with a limp. The ALJ must do more than state that
8 Plaintiff's symptoms are not "entirely consistent" with the medical evidence and
9 other evidence in the record. SSR 16-3P instructs that "it is not sufficient for our
10 adjudicators to make a single, conclusory statement that 'the individual's
11 statements about his or her symptoms have been considered" or that "the
12 statements about the individual's symptoms are (or are not) supported or
13 consistent.... The determination or decision must contain specific reasons for the
14 weight given to the individual's symptoms, be consistent with and supported by
15 the evidence, and be clearly articulated so the individual and any subsequent
16 review can assess how the adjudicator evaluated the individual's symptoms."
17 2017 WL 5180304. Here, the ALJ did not identify which symptoms are not
18 supported by the record. Plaintiff has right knee pain and limited range of motion,
19 left knee pain and limited range of motion, left hip pain/injury and back pain.
20 Simply identifying and summarizing the medical records, as the ALJ did in this
21 case, does not provide the necessary specific clear and convincing reasons for
22 discounting Plaintiff's symptoms.

23 Defendant's arguments that the ALJ properly found Plaintiff's subjective
24 allegations of total disability not persuasive is not supported by the ALJ's decision.
25 Defendant asserts the ALJ found Plaintiff's allegations were inconsistent with the
26 evidence showing that with treatment he had overall improvement in both
27 physical and mental functioning, citing to AR 23. But nowhere in the ALJ's
28 decision is such a statement is made. AR 23 indicates that the ALJ considered that

1 in June 2013, Plaintiff cancelled further physical therapy for his right knee as it
2 was getting worse rather than improving, suggesting that somehow this showed
3 Plaintiff was not being credible. But Plaintiff was right. His knee was getting
4 worse and he ultimately had unsuccessful surgery in February 2014. This is not a
5 valid reason to find Plaintiff's allegations inconsistent with the evidence.

6 Defendant also argues the ALJ found the objective evidence could not be
7 fully reconciled with the level of pain and limiting effects of the impairments.
8 Again, the ALJ did not do this. The ALJ did not identify the objective evidence
9 that was irreconcilable with Plaintiff's symptoms, other than to simply provide a
10 summary of the medical evidence. The ALJ failed to mention that the latest
11 Activity Prescription Form from August 2017 indicated that Plaintiff was unable
12 to work and the record is clear that he has been unable to work since he hurt his
13 knee in 2013. The ALJ's conclusion that treatment notes in the record do not
14 sustain Plaintiff's allegations of disabling pain and limitations is not supported by
15 substantial evidence.

16 *2. Whether the ALJ properly evaluated the medical opinion evidence*

17 There are three types of physicians: "(1) those who treat the claimant
18 (treating physicians); (2) those who examine but do not treat the claimant
19 (examining physicians); and (3) those who neither examine nor treat the claimant
20 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001). Generally, a
21 treating physician's opinion carries more weight than an examining physician's
22 opinion, and an examining physician's opinion carries more weight than a
23 reviewing physician's opinion. *Id.* at 1202. "In addition, the regulations give more
24 weight to opinions that are explained than to those that are not, and to the opinions
25 of specialists concerning matters relating to their specialty over that of
26 nonspecialists." *Id.* (citations omitted).

1 “If a treating physician’s opinion is well-supported by medically acceptable
2 clinical and laboratory diagnostic techniques and is not inconsistent with the other
3 substantial evidence in the case record, it will be given controlling weight.” *Orn*,
4 495 F.3d at 631. If a treating physician’s opinion is not given “controlling
5 weight,” the ALJ should consider the length of the treatment relationship and the
6 frequency of examination by the treating physician; the nature and extent of the
7 treatment relationship between the patient and the treating physician;
8 supportability; consistency with the record, and specialization of the physician. 20
9 C.F.R. § 404.1527(c)(2)-(6); *Orn*, 495 F.3d at 631.

10 If a treating or examining physician’s opinion is uncontradicted, the ALJ
11 may reject it only by offering “clear and convincing reasons that are supported by
12 supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th
13 Cir. 2005). The ALJ need not accept the opinion of any physician, including
14 treating physicians, if that opinion is brief, conclusory and inadequately supported
15 by clinical findings. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
16 (9th Cir. 2009). “If a treating or examining physician’s opinion is contradicted by
17 another doctor’s opinion, an ALJ may only reject it by providing specific and
18 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at
19 1216. This is so because, even when contradicted, a treating or examining
20 physician's opinion is still owed deference and will often be “entitled to the
21 greatest weight ... even if it does not meet the test for controlling weight.” *Orn*,
22 495 F.3d at 633. An ALJ may reject a treating physician's opinion if it is based
23 “to a large extent” on a claimant’s self-reports that have been properly discounted
24 as incredible. *Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir.
25 1999). It may reject a treating physician’s opinion if it is inconsistent with the
26 medical records. *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008).

27 “[A]n ALJ errs when he rejects a medical opinion or assigns it little weight
28 while doing nothing more than ignoring it, asserting without explanation that

1 another medical opinion is more persuasive, or criticizing it with boilerplate
2 language that fails to offer a substantive basis for his conclusion.” *Garrison v.*
3 *Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014) (citing *Nguyen v. Chater*, 100 F.3d
4 1462, 1464 (9th Cir. 1996)).

5 Here, the ALJ gave Dr. Seltzer’s assessment of Plaintiff’s left knee great
6 weight. Dr Seltzer opined there was no evidence of any pathological condition in
7 the Plaintiff’s left knee. This is in err because later imaging and other medical
8 sources concluded that Plaintiff’s left knee pain was because of Plaintiff’s hip
9 injury that occurred in 2011 when he fell off the ladder. There was a medical
10 reason for the pain in Plaintiff’s left knee and to give Dr. Seltzer’s assessment
11 great weight was arbitrary and in error.

12 The ALJ gave little weight to Dr. Smick and Dr. Fossier because they
13 provided no work-related functional limitations to accompany their examination
14 findings. This was in err. They diagnosed Plaintiff with a right knee sprain, right
15 knee chondromalacia, right knee tendinitis, and right knee posttraumatic arthritis.
16 Dr. Smick and Dr. Fossier corroborated Plaintiff’s symptoms of pain and their
17 opinions and findings should have been considered by the ALJ.

18 The ALJ erred in failing to assign anything more than little weight to any
19 other treatment providers, even those addressing relevant issues, and erred in
20 failing to include a weight analysis for several of Plaintiff’s treating providers.
21 The ALJ erred in failing to attribute weight to the treatment providers who treated
22 Plaintiff for several years at Yakima Worker Care, including Erin See, ARNP,
23 Jeanette Clark, ARNP, and Duane Frazier, PA-C. Notably, these medical sources
24 offered opinions regarding functional limitations greater than the ALJ’s RFC. The
25 ALJ failed to assign weight to Dr. Pezzella, who treated Plaintiff. The ALJ erred
26 in giving little weight to Dr. Gritzka. His opinion was not inconsistent with the
27 record, as the ALJ stated. Rather, his opinions were formed by a physical
28 evaluation of Plaintiff, then corroborated by a medical records review and imaging

1 studies. The ALJ's evaluation of the medical sources is not supported by
2 substantial evidence. Moreover, the ALJ failed to provide either clear and
3 convincing or specific and legitimate reasons for discrediting several of Plaintiff's
4 treating physician's opinions.

5 *3. Whether the ALJ properly determined Plaintiff's residual functional*
6 *capacity?*

7 Because the ALJ failed to properly consider the medical opinion evidence
8 and symptom testimony, the ALJ's RFC assessment does not account for the full
9 extent of Plaintiff's functional limitations. Thus, the RFC assessment cannot
10 support the ALJ's disability determination. In assessing Plaintiff's RFC, the ALJ
11 failed to account for the full extent of his ability to maintain productive, pace,
12 additional breaks, and absenteeism standards. It follows, then, that the ALJ's RFC
13 assessment, and the vocational testimony that relied upon it, cannot support the
14 ALJ's conclusion that Plaintiff can perform jobs in the national economy.

15 If the opinions of the Yakima Worker Care medical providers were given
16 proper weight, the ALJ would find that Plaintiff is capable of only sedentary work
17 and would find that he would be off task (need to take breaks) and absent more
18 than is customarily tolerated in unskilled employment.

19 **Conclusion**

20 Having reviewed the record and the ALJ's findings, the Court concludes the
21 ALJ's decision is not supported by substantial evidence. The ALJ erred in
22 discounting Plaintiff's allegations that pain, swelling, and limited range of motion
23 in his knees and hip limit his ability to complete full time work. The ALJ erred in
24 not giving adequate weight to Plaintiff's treatment provider. Here, if the
25 improperly rejected opinions of Plaintiff's treatment providers are given proper
26 weight, it is clear the record supports a finding that Plaintiff is incapable of
27 working on a regular and continuance basis and thus is disabled. *See Beneck v.*
28 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (instructing that district courts should

1 credit evidence that was rejected during the administrative process and remand for
2 an immediate award of benefits if (1) the ALJ failed to provide legally sufficient
3 reasons for rejecting the evidence; (2) there are no outstanding issues that must be
4 resolved before a determination of disability can be made; and (3) it is clear from
5 the record that the ALJ would be required to find the claimant disabled were such
6 evidence credited.)

7 The Court finds that a remand in this case would serve no useful purpose
8 and would only delay an award. *Varney v. Sec. Health & Hum. Servs.*, 859 F.2d
9 1396, 1138 (9th Cir. 1988).

10 Accordingly, **IT IS HEREBY ORDERED:**

- 11 1. Plaintiff's Motion for Summary Judgment, ECF No. 10, is **GRANTED**.
- 12 2. Defendant's Motion for Summary Judgment, ECF No. 11, is **DENIED**.
- 13 3. The decision of the Commissioner denying benefits is reversed and this
14 case is remanded for the immediate calculation and award of benefits.
- 15 4. The District Court Executive is directed to enter judgment in favor of
16 Plaintiff and against Defendant.

17 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
18 file this Order, provide copies to counsel, and close the file.

19 **DATED** this 17th day of June 2020.



23
24

A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

25 Stanley A. Bastian
26 United States District Judge
27
28