

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

Aug 19, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUAN G.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:20-CV-03052-JTR

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 16, 32. Attorney D. James Tree represents Juan G. (Plaintiff); Special Assistant United States Attorney Summer Stinson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff’s Motion for Summary Judgment; **DENIES** Defendant’s Motion for Summary Judgment; and

¹Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed an application for Supplemental Security Income on October
5 3, 2012, Tr. 81, alleging disability since January 1, 2006, Tr. 237, due to hearing
6 voices in his head, a learning disability, and psychosis, Tr. 330. The application
7 was denied initially and upon reconsideration. Tr. 159-62, 164-65. Administrative
8 Law Judge (ALJ) Larry Kennedy held a hearing on April 21, 2015. Tr. 42-74. At
9 this hearing, Plaintiff amended his application to a closed period from September
10 1, 2012 to October 1, 2013. Tr. 50. The ALJ issued an unfavorable decision on
11 September 4, 2015, Tr. 20-31. The Appeals Council denied the request for review
12 on February 15, 2017. Tr. 1-4. Plaintiff filed an action for judicial review on April
13 13, 2017. Tr. 1580. On May 29, 2018, District Judge Salvador Mendoza, Jr.
14 issued an Order remanding the case to the Commissioner for further proceedings.
15 Tr. 1584-1603.

16 While the initial application was pending before this Court, Plaintiff filed a
17 second application for Supplemental Security Income on April 12, 2017, Tr. 1549,
18 alleging disability since April 1, 2017, Tr. 1753, due to psychosis, anxiety, bipolar
19 disorder, schizoaffective disorder, esophageal leukoplakia, pain in his leg, back
20 and chest, and sleep apnea, Tr. 1782. The application was denied initially and on
21 reconsideration. Tr. 1656-64, 1667-73. Plaintiff requested a hearing before an
22 ALJ on February 8, 2018. Tr. 1674-76.

23 On August 11, 2018, the Appeals Council issued an Order remanding the
24 initial application to the Administrative Law Judge and consolidating the initial
25 application and the second application. Tr. 1604-08. On May 13, 2019, Plaintiff's
26 request for a hearing in the second application was dismissed. Tr. 1609-11. On
27 January 16, 2020, ALJ C. Howard Prinsloo held a second hearing and took the
28 testimony of Plaintiff and vocational expert Kimberly Mullinax. Tr. 1505-25. On

1 February 4, 2020, the ALJ issued a decision finding that Plaintiff had not been
2 under a disability since October 3, 2012, the date the first application was filed.
3 Tr. 1484-96. In his analysis, the ALJ divided the case into two relevant periods:
4 September 1, 2012 through October 1, 2013, and April 12, 2017 to the date of his
5 decision. *Id.* The Appeals Council did not assume jurisdiction under 20 C.F.R. §
6 416.1484. Therefore, this became the final decision of the Commissioner, which is
7 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed the
8 Complaint in this case on April 23, 2020. ECF No. 1.

9 **STATEMENT OF FACTS**

10 Plaintiff was 26 years old at the date of the first application at issue in this
11 case. Tr. 237. The highest-grade Plaintiff completed was the eighth. Tr. 331. His
12 reported work history includes the positions of baker, cashier, field worker, and
13 wine bottler. Tr. 280, 331. At application, he reported that he stopped working on
14 June 1, 2006 because he went to jail. Tr. 330. At the April 2015 hearing, he
15 testified that he worked at Jack in the Box from 2013 to 2014. Tr. 56-57. Earnings
16 records shows that he earned substantial gainful activity during this time. Tr. 259.
17 He also testified that he was working for a temporary firm called ACTNOW. Tr.
18 55. At the January 2020 hearing, Plaintiff testified that he stopped working in
19 2017 because he was hearing voices. Tr. 1511-12.

20 **STANDARD OF REVIEW**

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

1 1098. Put another way, substantial evidence is such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
3 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
4 rational interpretation, the Court may not substitute its judgment for that of the
5 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
6 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
7 administrative findings, or if conflicting evidence supports a finding of either
8 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
9 *Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision
10 supported by substantial evidence will be set aside if the proper legal standards
11 were not applied in weighing the evidence and making the decision. *Browner v.*
12 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

13 SEQUENTIAL EVALUATION PROCESS

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
16 *Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the claimant
17 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
18 at 1098-99. This burden is met once a claimant establishes that a physical or
19 mental impairment prevents the claimant from engaging in past relevant work. 20
20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
21 proceeds to step five, and the burden shifts to the Commissioner to show (1) the
22 claimant can make an adjustment to other work; and (2) the claimant can perform
23 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*
24 *Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an
25 adjustment to other work in the national economy, the claimant will be found
26 disabled. 20 C.F.R. § 416.920(a)(4)(v).

27 ADMINISTRATIVE DECISION

28 On February 4, 2020, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act. Tr. 1484-96.

2 At step one, the ALJ found Plaintiff had engaged in substantial gainful
3 activity from August of 2013 through October of 2014, but found that there was
4 “no evidence to establish substantial gainful activity during the two periods of
5 issue in this case.” Tr. 1487.

6 At step two, the ALJ determined Plaintiff had the following severe
7 impairments: psychosis disorder; personality disorder; substance abuse disorder;
8 and obesity. Tr. 1487.

9 At step three, the ALJ found Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr. 1487.

12 The ALJ assessed Plaintiff’s residual functional capacity and found he could
13 perform medium work with the following limitations: “he is limited to simple,
14 routine tasks. He is able to follow short, simple instructions. He requires minimal
15 supervisor contact and no public contact. He is unable to work cooperatively or as
16 part of a team with coworkers.” Tr. 1489.

17 At step four, the ALJ identified Plaintiff’s past relevant work as a fundraiser
18 II, stores laborer, fruit II farm worker, bottling line attendant, janitor, and
19 agricultural produce sorter. Tr. 1494. He found that Plaintiff could perform the
20 past relevant work as a laborer, bottling line attendant, agricultural produce sorter,
21 and janitor. *Id.*

22 Despite this step four finding, the ALJ made the following alternative
23 finding at step five: considering Plaintiff’s age, education, work experience and
24 residual functional capacity, there were jobs that existed in significant numbers in
25 the national economy that Plaintiff could perform, specifically the representative
26 occupations of industrial cleaner, laundry worker II, and marker. Tr. 1495.

27 The ALJ thus concluded Plaintiff was not under a disability within the
28 meaning of the Social Security Act at any time from October 3, 2012 through the

1 date of the decision. Tr. 1496.

2 **ISSUES**

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) improperly rejecting his
6 symptom testimony and (2) improperly evaluating the medical opinions.

7 **DISCUSSION**

8 **1. Plaintiff's Symptom Statements**

9 Plaintiff contests the ALJ's determination that Plaintiff's symptom
10 statements were unreliable. ECF No. 16 at 15-18.

11 It is generally the province of the ALJ to make determinations regarding the
12 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
13 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
14 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
15 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
16 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
17 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
18 rather the ALJ must identify what testimony is not credible and what evidence
19 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

20 Initially, the ALJ addressed Plaintiff's symptom statements during the first
21 hearing regarding the closed period of September 1, 2012 through October 1, 2013:
22 "I adopt and incorporate by reference the discussion of the claimant's subjective
23 complaints from the last decision," Tr. 1489, and "I adopt and incorporate by
24 reference the discussion of the medical evidence from the prior decision (B6A/9-
25 12). The discussion of the claimant's mental health and substance impairments
26 from the prior decision were not disturbed by the District Court," Tr. 1490. The
27 Order issued by District Judge Mendoza found that the ALJ did not err in his
28 treatment of Plaintiff's symptom statements. Tr. 1598-1600. Therefore, under the

1 law of the case doctrine, the undersigned cannot readdress this issue. *Stacey v.*
2 *Colvin*, 825 F.3d 563, 567 (9th Cir. 2016) (“The law of the case doctrine generally
3 prohibits a court from considering an issue that has already been decided by that
4 same court or a higher court in the same case.”).

5 Next, the ALJ addressed Plaintiff’s symptom statements from the second
6 hearing and found that Plaintiff’s “statements concerning the intensity, persistence,
7 and limiting effects of these symptoms are not entirely consistent with the medical
8 evidence and other evidence in the record for the reasons explained in this
9 decision.” Tr. 1490. In addition to the ALJ’s general determination that Plaintiff’s
10 symptom statements were “not entirely consistent with the medical evidence,” the
11 ALJ provided two reasons for rejecting Plaintiff’s symptom statements: (1) they
12 were not supported by Plaintiff’s activities of daily living; and (2) they were not
13 supported by Plaintiff’s work activity.

14 The ALJ’s general finding that the Plaintiff’s symptom statements were not
15 consistent with the objective medical evidence is not specific, clear and
16 convincing. The Ninth Circuit has specifically held that a generic non-credibility
17 finding followed by a summary of the medical evidence does not meet the
18 “specific” portion of the “specific, clear and convincing” standard. *Brown-Hunter*
19 *v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015). The Ninth Circuit held that when
20 discussing a claimant’s symptom testimony, “[t]he clear and convincing standard is
21 the most demanding required in Social Security cases.” *Garrison v. Colvin*, 759
22 F.3d 995, 1015 (9th Cir. 2014) *citing Moore*, 278 F.3d 920, 924 (9th Cir. 2002)
23 (internal citations omitted).² Therefore, any reason the Court must “infer” from the
24
25

26 ²The language in *Garrison* identifying the clear and convincing standard as
27 the most demanding required in Social Security cases and continues to be
28 referenced by the Ninth Circuit in decisions since the March 28, 2016 effective

1 ALJ's decision as a reason for rejecting Plaintiff's testimony cannot meet the
2 "specific, clear and convincing standard." *See Brown-Hunter*, 806 F.3d at 494
3 ("Although the inconsistencies identified by the district court could be reasonable
4 inferences drawn from the ALJ's summary of the evidence, the credibility
5 determination is exclusively the ALJ's to make, and ours only to review. As we
6 have long held, '[W]e are constrained to review the reasons the ALJ asserts.'"
7 citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

8 Here, the ALJ found that Plaintiff's "symptoms are not entirely consistent
9 with the medical evidence," the ALJ then summarized the medical evidence, and
10 concluded that "[o]verall, the longitudinal history of the treatment notes both
11 during the requested closed period and since the time of the claimant's most recent
12 Title XVI application fails to support a finding of disability." Tr. 1490-91. This
13 portion of the ALJ's determination rejecting Plaintiff symptom statements was
14 essentially nothing more than a summary of the evidence rejected by the Ninth
15 Circuit in *Brown-Hunter*. Tr. 1490-91. Without some specific analysis identifying
16 how Plaintiff's statements were undermined by the medical evidence, this reason
17 fails to meet the specific, clear and convincing standard.

18 The ALJ's finding that Plaintiff's symptom statements were not supported
19 by his reported activities is not specific, clear and convincing. A claimant's daily
20 activities may support an adverse credibility finding if (1) the claimant's activities
21 contradict his other testimony, or (2) "the claimant is able to spend a substantial
22 part of his day engaged in pursuits involving performance of physical functions
23 that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
24 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). "The ALJ must
25 make 'specific findings relating to [the daily] activities' and their transferability to
26 _____

27 date of the S.S.R. 16-3p. *See Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir.
28 2017).

1 conclude that a claimant’s daily activities warrant an adverse credibility
2 determination.” *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
3 2005)). A claimant need not be “utterly incapacitated” to be eligible for benefits.
4 *Fair*, 885 F.2d at 603.

5 Here, the ALJ found that “[d]espite his impairments, the claimant is able to
6 engage in a full range of daily activities to include helping to care for his children.”
7 Tr. 1491. First, this finding by the ALJ inferred that Plaintiff’s symptom
8 statements were inconsistent with his ability to care for his children. Inferred
9 reasons failed to meet the specific, clear and convincing standard. *See Reddick v.*
10 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (“General findings are insufficient;
11 rather, the ALJ must identify what testimony is not credible and what evidence
12 undermines the claimant's complaints.”).

13 Furthermore, the Ninth Circuit has warned ALJs against using simple
14 household activities against a person when evaluating their testimony:

15 We have repeatedly warned that ALJs must be especially cautious in
16 concluding that daily activities are inconsistent with testimony about pain,
17 because impairments that would unquestionably preclude work and all the
18 pressures of a workplace environment will often be consistent with doing
19 more than merely resting in bed all day.

20 *Garrison*, 759 F.3d at 1016. Therefore, this reason fails to meet the specific, clear
21 and convincing standard.

22 The ALJ’s finding that Plaintiff’s symptom statements were inconsistent
23 with this work activity is not specific, clear and convincing. The ALJ found that
24 “while during his hearing the claimant alleged that his functioning worsened,
25 which is why he filed a new application for disability, his earnings record and
26 testimony indicate that he was able to work a seasonal job since the protective
27 filing date and applied for and collected unemployment.” Tr. 1490. The earnings
28 reveals that Plaintiff worked four jobs in 2017 earning a total of \$8,582.33 and two

1 jobs in 2018 earning a total of \$11,160.83. Tr. 1774. Plaintiff also received
2 unemployment in the third and fourth quarters of 2018 and the first quarter of
3 2019. Tr. 1775. This information demonstrates that Plaintiff earned substantial
4 gainful activity in the first and third quarters of 2018 working through Atlas
5 Staffing, Inc. a temp agency. Tr. 1775. See “Substantial Gainful Activity”
6 <https://www.ssa.gov/oact/cola/sga.html> (accessed Aug. 11, 2021). Plaintiff
7 testified that this job was picking, sorting, and cleaning apples. Tr. 1511. He
8 stated that he was taking his medications, but he heard voices and was
9 experiencing paranoia, which is why he stopped working. Tr. 1511-13. He argues
10 that this work activity was consistent with Dr. Cline’s statements that “even those
11 with schizophrenia can work, just not likely full time or in a high stress
12 environment.” ECF No. 16 at 16 *citing* Tr. 2314. Here, the ALJ failed to state
13 how Plaintiff’s ability to work at substantial gainful activity levels in two
14 nonconsecutive quarters for a temporary employment agency is inconsistent with
15 Plaintiff’s statements. Plaintiff stated that he liked working, but left due to
16 increased symptoms. Tr. 1512-13. When asked why he had not returned to work
17 for a year, he stated “I just don’t want to deal with all the chaos and voices and
18 stuff.” Tr. 1513. Therefore, without more than the ALJ’s general statement that he
19 worked, this fails to meet the specific, clear and convincing standard. See *Reddick*,
20 157 F.3d at 722 (“General findings are insufficient; rather, the ALJ must identify
21 what testimony is not credible and what evidence undermines the claimant's
22 complaints.”).

23 Defendant argues that the ALJ found a lack of treatment and improvement
24 with medication as reasons for rejecting Plaintiff’s statements. ECF No. 32 at 6-7.
25 However, the ALJ never actually found that these undermined Plaintiff’s symptom
26 statements. Tr. 1491. As such, Defendant’s assertion is a *post hoc* rationalization,
27 which will not be considered by this Court. See *Orn*, 495 F.3d at 630 (The Court
28 will “review only the reasons provided by the ALJ in the disability determination

1 and may not affirm the ALJ on a ground upon which he did not rely.”).

2 In conclusion, the law of the case doctrine precludes the undersigned from
3 addressing Plaintiff’s statements from the first hearing. However, the undersigned
4 finds that the ALJ erred in the treatment of Plaintiff’s symptom statements from
5 the second hearing. Remand is appropriate to address these statements pertaining
6 to the second period at issue in this case.

7 **2. Medical opinion evidence**

8 Plaintiff contends the ALJ erred by improperly evaluating the medical
9 opinions. Specifically, he asserts the ALJ erred in rejecting the opinions of
10 Richard N. Jacks, Ph.D., Janis Lewis, Ph.D., William Drenguis, M.D., and R.A.
11 Cline, Psy.D. ECF No. 16 at 7-15. The opinion of Dr. Lewis was addressed in the
12 ALJ’s 2015 decision and assigned no weight at that time. Tr. 29. Dr. Jacks’
13 opinion was not discussed in the ALJ’s 2015 decision. District Judge Mendoza
14 instructed that these opinions be reweighed on remand. Tr. 1592-96. The opinions
15 of Dr. Drenguis and Dr. Cline were submitted after the ALJ’s 2015 decision and
16 addressed initially in the ALJ’s 2020 decision. Tr. 1492-93, 1503.

17 In weighing medical source opinions, the ALJ should distinguish between
18 three different types of physicians: (1) treating physicians, who actually treat the
19 claimant; (2) examining physicians, who examine but do not treat the claimant;
20 and, (3) nonexamining physicians who neither treat nor examine the claimant.
21 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
22 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
23 631. Likewise, the ALJ should give more weight to the opinion of an examining
24 physician than to the opinion of a nonexamining physician. *Id.*

25 When a treating physician’s opinion is not contradicted by another
26 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
27 and when a treating physician’s opinion is contradicted by another physician, the
28 ALJ is only required to provide “specific and legitimate reasons” supported by

1 substantial evidence to reject the opinion. *Lester*, 81 F.3d at 830. The specific and
2 legitimate standard can be met by the ALJ setting out a detailed and thorough
3 summary of the facts and conflicting clinical evidence, stating his interpretation
4 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
5 1989). The ALJ is required to do more than offer his conclusions, he “must set
6 forth his interpretations and explain why they, rather than the doctors’, are
7 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).³

8 **A. Richard N. Jacks, Ph.D.**

9 On August 2, 2012, Dr. Jacks completed a Behavioral Health Discharge
10 Summary for the Department of Corrections, Tr. 794-96, and a Functional
11 Limitations Rating for 15290 Expediated Medicaid Eligibility Cases form, Tr. 793.
12 He opined that Plaintiff had a marked limitation in eight basic work activities and a
13 moderate limitation in the remaining five basic work activities. *Id.*

14 In the ALJ’s 2020 decision, the opinion was assigned little weight for three
15 reasons: (1) it was rendered while the claimant was incarcerated and close to a time
16 when he was still abusing substances; (2) Plaintiff’s impairments improved with
17 treatment and he was able to return to work; and (3) the check list portion of the
18 opinion was inconsistent with his narrative. Tr. 1493.

19 Here, the first reason provided by the ALJ, that it was rendered while
20 Plaintiff was incarcerated and close to a time when he was still abusing substances,
21 is a general statement and fails to provide any citation to the record in support of
22

23 ³This Court notes that Plaintiff’s second application was filed after March
24 27, 2017 change in the Code of Federal Regulations that ended the treating
25 physician rule. *Revisions to Rules Regarding the Evaluation of Medical Evidence*,
26 2017 WL 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c.
27 However, this application was dismissed. Tr. 1609-12. Therefore, the treating
28 physician rule applies to the entire period at issue.

1 the finding. *Id.* There is no discussion of how Plaintiff’s incarceration rendered
2 the opinion unreliable. Likewise, the ALJ’s reliance on the opinion’s proximity to
3 substance use is inconsistent with the ALJ’s next sentence finding substance abuse
4 not material to disability. Without some discussion as to how incarceration or
5 substance abuse rendered the opinion unreliable, this fails to meet the specific and
6 legitimate standard.

7 Likewise, the ALJ’s conclusion that Plaintiff’s impairments improved with
8 treatment fails. The ALJ found that Plaintiff’s impairments improved with
9 treatment and he was able to return to work. Tr. 1493. However, this is consistent
10 with the September 1, 2012 to October 1, 2013 closed period alleged by Plaintiff.
11 Dr. Jacks’ August 2012 opinion coincides with the beginning of this closed period.
12 Therefore, treatment followed by a return to work over a year later does not
13 invalidate the opinion.

14 The ALJ’s third reason for rejecting the opinion, that the check list portion
15 of the opinion was inconsistent with Dr. Jacks’ narrative, is not specific and
16 legitimate. The ALJ found that Dr. Jacks’ narrative “indicates that the claimant’s
17 prognosis is positive if he remains clean and sober.” Tr. 1493. He then found that
18 “[t]he records during the requested closed period show good adherence to
19 treatment and do not document the degree of severity reflect[ed] in the check box
20 portion of Dr. Jacks’ opinion.” *Id.* In his narrative, Dr. Jacks stated the following:

21 [Plaintiff] has not developed appropriate work values that would allow
22 him to be on time. Should [Plaintiff] be able to remain free of drugs
23 and alcohol his employability will be pretty positive. If he does return
24 to illegal substances or goes off his psychotropic medication, he will
25 not be able to focus, concentrate, or maintain himself at a work
environment.

26 Tr. 1167. Dr. Jacks also “recommend[ed] 24 months ABD through DSHS.” Tr.

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28 ///

1 1165.⁴ Here, Dr. Jacks’ opinion was that with abstinence from substances and
2 adherence to medical treatment his employment prospective was positive, and he
3 recommended two years of eligibility for benefits intended to mirror the disability
4 requirements of Supplemental Security Income. Therefore, the ALJ’s finding that
5 Plaintiff’s good adherence to treatment followed by a return to work over a year
6 later, supports Dr. Jacks’ opinion. There is no internal inconsistency, and this fails
7 to meet the specific and legitimate standard. On remand, the ALJ will readdress
8 the opinion of Dr. Jacks.

9 **B. Janis Lewis, Ph.D.**

10 On September 20, 2012, Dr. Lewis completed a Review of Medical
11 Evidence form for the Washington State Department of Social and Health Services
12 (DSHS). Tr. 1163. She reviewed the Washington State Department of Corrections
13 medical reports, which included Dr. Jacks’ opinion. *Id.* She stated that he was a
14 dangerous mentally ill offender. *Id.* She confirmed Dr. Jacks’ opinion with an
15 onset of July 26, 2011 and a duration of a year. *Id.*

16 In the ALJ’s 2020 decision, the opinion was given little weight for four
17 reasons: (1) the opinion was rendered less than a month after the requested closed
18 period; (2) the opinion relies primarily on evidence during a period of time where
19 the claimant was not alleging disability; (3) the opinion was rendered while
20 Plaintiff was incarcerated and shortly after a period of substance abuse; and (4) the

21
22 ⁴Dr. Jacks’ reference to “ABD” is to the Washington State program called
23 Aged, Blind, and Disabled, which provides cash assistance to “eligible low-income
24 individuals who are age 65 or older, blind, or determined likely to meet
25 Supplemental Security Income (SSI) disability criteria based on impairment(s)
26 expected to last at least 12 consecutive months.” *See*
27 [https://www.dshs.wa.gov/esa/community-services-offices/aged-blind-or-disabled-](https://www.dshs.wa.gov/esa/community-services-offices/aged-blind-or-disabled-abd-cash-assistance-program)
28 [abd-cash-assistance-program](https://www.dshs.wa.gov/esa/community-services-offices/aged-blind-or-disabled-abd-cash-assistance-program) (accessed Aug. 12, 2021).

1 opinion is not reflective of his daily functioning during the closed period. Tr.
2 1493. This opinion is based on the opinion of Dr. Jacks, which is to be readdressed
3 on remand. Therefore, this opinion must be addressed again on remand as well.

4 **C. William Drenguis, M.D.**

5 On December 3, 2017, Dr. Drenguis completed a consultative evaluation of
6 Plaintiff. Tr. 2301-05. He diagnosed Plaintiff with a history of intermittent low
7 back pain with no findings on today's examinations. Tr. 2304. He opined that
8 Plaintiff had no limitations except a lifting/carrying/pushing/pulling capacity
9 limited to 50 pounds occasionally and 25 pounds frequently. Tr. 2305. Further, he
10 stated that Plaintiff "may frequently climb steps, stairs, ladders, scaffolds, ropes,
11 and frequently balance, stoop, crouch, kneel, and crawl." *Id.*

12 The ALJ assigned the opinion great weight, stating that "Dr. Drenguis[']
13 opinion that the claimant was limited to the medium range of lifting and carrying,
14 but otherwise opined no significant limitations." Tr. 1492. The ALJ's
15 determination did not address the postural limitations opined by Dr. Drenguis. This
16 was an error. Social Security Ruling (S.S.R.) 96-8p states that the residual
17 functional capacity assessment "must always consider and address medical source
18 opinions. If the [residual functional capacity] assessment conflicts with an opinion
19 from a medical source, the adjudicator must explain why the opinion was not
20 adopted." Therefore, the ALJ's determination giving the opinion great weight but
21 not including the postural limitations in the residual functional capacity
22 determination was an error.

23 **D. R.A. Cline, Psy.D.**

24 On November 8, 2016, Dr. Cline completed a Psychological/Psychiatric
25 Evaluation for DSHS. Tr. 2316-21. Dr. Cline diagnosed Plaintiff with antisocial
26 personality disorder, borderline personality disorder, and unspecified psychotic
27 disorder with a rule out substance induced/exacerbated. Tr. 2318. He opined that
28 Plaintiff had a marked limitation in the abilities to communicate and perform

1 effectively in a work setting, to maintain appropriate behavior in a work setting,
2 and to complete a normal work day and work week without interruptions from
3 psychologically based symptoms. Tr. 2319. He also opined that Plaintiff had a
4 moderate limitation in another seven basic work activities. *Id.* He opined that
5 Plaintiff would be impaired with available treatment for nine to twelve months. Tr.
6 2319.

7 The ALJ gave the opinion little weight for two reasons: (1) the opinion was
8 rendered after the closed period but more than a year prior to Plaintiff's most
9 recent application and (2) the opined limitations were to last only six to twelve
10 months. Tr. 1493.

11 Defendant did not challenge Plaintiff's argument that the ALJ erred in the
12 weight assigned to this opinion. ECF No. 32 at 8-9. While this opinion is dated
13 prior to the second relevant period, it is opined to last into the second relevant
14 period the ALJ was addressing in this case. Therefore, the ALJ will also reweigh
15 the opinion of Dr. Cline upon remand.

16 REMEDY

17 Plaintiff asks the Court to remand this case for an immediate award of
18 benefits. ECF No. 16 at 18.

19 The decision whether to remand for further proceedings or reverse and
20 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
21 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule the Court remands
22 for an award of benefits when (1) the record has been fully developed and further
23 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
24 to provide legally sufficient reasons for rejecting evidence, whether claimant
25 testimony or medical opinion; and (3) if the improperly discredited evidence were
26 credited as true, the ALJ would be required to find the claimant disabled on
27 remand. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Remand is
28 appropriate where there are outstanding issues that must be resolved before a

1 determination can be made, and it is not clear from the record that the ALJ would
2 be required to find a claimant disabled if all the evidence were properly evaluated.
3 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
4 211 F.3d 1172, 1179-80 (9th Cir. 2000).

5 This case is remanded for additional proceedings because it is not clear from
6 the record that the ALJ would be required to find Plaintiff disabled if all the
7 evidence were properly evaluated. The ALJ will reevaluate Plaintiff's symptom
8 statements in the second hearing and readdress the medical opinions addressed
9 above. Additionally, the ALJ will supplement the record with any outstanding
10 medical evidence pertaining to the second period in question and take testimony
11 from a vocational expert.

12 CONCLUSION

13 Accordingly, **IT IS ORDERED:**

- 14 1. Defendant's Motion for Summary Judgment, **ECF No. 32**, is
15 **DENIED**.
- 16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
17 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
18 consistent with this order.
- 19 3. Application for attorney fees may be filed by separate motion.

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

23 **IT IS SO ORDERED.**

24 DATED August 19, 2021.



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

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE