

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

Jun 30, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EFRAHIN H.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:20-CV-03113-JTR

ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 17. Attorney D. James Tree represents Efrahin H. (Plaintiff); Special Assistant United States Attorney Jeffrey Staples 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** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

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1 **JURISDICTION**

2 Plaintiff filed applications for Disability Insurance Benefits and
3 Supplemental Security Income on June 20, 2016, alleging disability since June 7,
4 2016, due to a lower back injury. Tr. 72. The applications were denied initially and
5 upon reconsideration. Tr. 117-24, 127-32. Administrative Law Judge (ALJ)
6 Virginia Robinson held a hearing on May 9, 2018, which was postponed for
7 Plaintiff to obtain a representative. Tr. 735-50. Judge Robinson held a second
8 hearing on May 7, 2019, Tr. 31-69, and issued an unfavorable decision on July 19,
9 2019. Tr. 15-25. Plaintiff requested review by the Appeals Council and the
10 Appeals Council denied the request for review on May 29, 2020. Tr. 1-5. The
11 ALJ’s July 2019 decision became the final decision of the Commissioner, which is
12 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
13 action for judicial review on July 23, 2020. ECF No. 1.

14 **STATEMENT OF FACTS**

15 Plaintiff was born in 1992 and was 24 years old as of his alleged onset date.
16 Tr. 23. He has a high school education and worked primarily in agriculture and
17 warehousing. Tr. 351. He testified he initially hurt his back while stacking boxes
18 and could not perform lighter work due to his need to lay down for many hours
19 throughout the day to relieve pain. Tr. 40-44. He testified that he was too scared to
20 undergo surgery at first, and tried more conservative treatments, but was planning
21 on discussing surgery again due to a lack of relief. Tr. 41-42, 50-51.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*, with
26 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
28 only if it is not supported by substantial evidence or if it is based on legal error.

1 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
2 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
3 1098. Put another way, substantial evidence is such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
5 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
6 rational interpretation, the Court may not substitute its judgment for that of the
7 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
8 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
9 administrative findings, or if conflicting evidence supports a finding of either
10 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
11 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
12 supported by substantial evidence will be set aside if the proper legal standards
13 were not applied in weighing the evidence and making the decision. *Brawner v.*
14 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
18 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
19 four the claimant bears the burden of establishing a prima facie case of disability.
20 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that
21 a physical or mental impairment prevents the claimant from engaging in past
22 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot
23 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to
24 the Commissioner to show (1) the claimant can make an adjustment to other work;
25 and (2) the claimant can perform specific jobs that exist in the national economy.
26 *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If
27 a claimant cannot make an adjustment to other work in the national economy, the
28 claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

1 The ALJ thus concluded Plaintiff was not under a disability within the
2 meaning of the Social Security Act at any time from the alleged onset date through
3 the date of the decision. Tr. 25.

4 ISSUES

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

8 Plaintiff contends the ALJ erred by (1) not fully and fairly developing the
9 record; (2) improperly rejecting medical opinions; and (3) not properly assessing
10 Plaintiff's subjective testimony.

11 DISCUSSION

12 1. Plaintiff's subjective statements

13 Plaintiff alleges the ALJ improperly disregarded his subjective symptom
14 reports. ECF No. 16 at 14-21.

15 It is the province of the ALJ to make determinations regarding a claimant's
16 subjective complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
17 However, the ALJ's findings must be supported by specific, cogent reasons.
18 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
19 produces medical evidence of an underlying medical impairment, the ALJ may not
20 discredit testimony as to the severity of an impairment merely because it is
21 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
22 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
23 the claimant's testimony must be "specific, clear and convincing." *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
25 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify
26 what testimony is not credible and what evidence undermines the claimant's
27 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
28 1993).

1 The ALJ found Plaintiff's medically determinable impairments could
2 reasonably be expected to cause the alleged symptoms; however, she found
3 Plaintiff's statements concerning the intensity, persistence and limiting effects of
4 his symptoms to be not entirely consistent with the medical evidence and other
5 evidence in the record. Tr. 19. The ALJ found Plaintiff's allegations to be
6 incompatible with his minimal pursuit of treatment, evidence of improvement with
7 conservative treatment, his activities, and his receipt of unemployment benefits. Tr.
8 19-22. The ALJ also found notes of exaggeration/malingering and evidence of
9 secondary gain further undermined the reliability of Plaintiff's allegations. *Id.*

10 Plaintiff argues the ALJ improperly found him to be a malingerer and
11 improperly interpreted the record with respect to his treatment, activities, and
12 pursuit of other benefits. ECF No. 16 at 14-21. Defendant argues that because there
13 is affirmative evidence of malingering, the ALJ did not need to offer any other
14 basis for discounting Plaintiff's subjective reports. ECF No. 17 at 2-5.

15 The Court finds the ALJ did not err. A finding of malingering is sufficient to
16 support an ALJ's rejection of a claimant's subjective reports. *See Benton v.*
17 *Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ noted PA-C David Fine's
18 notes regarding "slight malingering" on multiple occasions. Tr. 20, 538, 566.

19 Plaintiff argues these notes are insufficient to label Plaintiff a malingerer, as the
20 evidence came only from a non-acceptable source to whom the ALJ assigned only
21 minimal weight, and whose treatment notes contain significant objective evidence
22 of impairment. ECF No. 16 at 10, 14. He argues malingering requires a deliberate
23 attempt to deceive and the notes are insufficient to establish Plaintiff's motive. *Id.*
24 at 14-15. Defendant asserts the case law does not require any particular level or
25 severity of malingering or that the assessment come from an acceptable source,
26 only that evidence of malingering be "affirmative." ECF No. 17 at 3. While
27 Plaintiff offers an alternative explanation for the persuasiveness of the evidence,
28 the ALJ's interpretation and finding of affirmative evidence of malingering is

1 supported by substantial evidence. She therefore offered legally sufficient rationale
2 for disregarding Plaintiff's subjective complaints.

3 Alternatively, the Court finds the ALJ offered other clear and convincing
4 reasons for finding Plaintiff's testimony to be unpersuasive. Unexplained or
5 inadequately explained reasons for failing to seek medical treatment or follow a
6 prescribed course of treatment can cast doubt on a claimant's subjective
7 complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The record contains
8 multiple notations of Plaintiff's failure to follow through with recommendations
9 regarding physical therapy and referrals to an orthopedist. Tr. 537, 562, 566, 598,
10 637. While one note indicates he had transportation issues, it also indicates
11 Plaintiff had not even called the referred provider's office yet. Tr. 566.

12 An ALJ may also consider the type and effectiveness of treatment received.
13 Social Security Ruling 16-3p. While it cannot serve as the sole basis for
14 disregarding a claimant's reports, support from objective medical evidence is a
15 "relevant factor in determining the severity of the claimant's pain and its disabling
16 effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ found
17 Plaintiff's allegations of disabling limitations to be inconsistent with evidence of
18 adequate management with minimal conservative treatment and largely normal
19 physical exams. Tr. 21. The ALJ's interpretation of the record is reasonable.

20 **2. Opinion evidence**

21 Plaintiff alleges the ALJ erred by improperly disregarding the medical
22 opinion evidence from Dr. Crank, Dr. Palasi, and PA-C Richmond. ECF No. 16 at
23 7-14.

24 *a. Dr. Jeremiah Crank and Dr. Myrna Palasi*

25 When an examining physician's opinion is contradicted by another
26 physician, the ALJ may reject the opinion by providing "specific and legitimate
27 reasons," based on substantial evidence. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
28 Cir. 1995). The specific and legitimate standard can be met by the ALJ setting out

1 a detailed and thorough summary of the facts and conflicting clinical evidence,
2 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
3 F.2d 747, 751 (9th Cir. 1989). An ALJ may reject the opinion of a non-examining
4 physician by reference to specific evidence in the medical record. *Sousa v.*
5 *Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998).

6 Plaintiff presented to Dr. Crank in April 2016 for a DSHS physical exam
7 and completion of disability paperwork. Tr. 446-55. Dr. Crank found Plaintiff had
8 tenderness to palpation of his lower back and a positive straight leg raise
9 bilaterally, with normal strength and sensation, and some reduction in range of
10 motion. Tr. 449-50, 455. He completed the DSHS paperwork, stating Plaintiff had
11 marked limitations in all physical movements due to lumbar radiculopathy/
12 herniated disc, and was limited to performing sedentary work. Tr. 447-48. A month
13 later, Dr. Myrna Palasi reviewed Dr. Crank's report and Plaintiff's 2013 MRI, and
14 concurred with Dr. Crank's diagnoses, but opined that due to chronic intractable
15 pain, she would rate Plaintiff's impairment as level five (severe) and limit him to
16 less than sedentary work. Tr. 578.

17 The ALJ gave these opinions minimal weight.¹ Tr. 22. She found the
18 objective evidence did not support marked postural, environmental, and
19 manipulative limits, noted treating source Mr. Fine expressly disagreed with
20 Plaintiff's claim to disability, and the ALJ reiterated Plaintiff's failure to follow
21 through with treatment recommendations and his pursuit of secondary gain, while
22 indicating that his symptoms were adequately managed with minimal conservative
23 treatment. Tr. 22.

24 Plaintiff argues the ALJ selectively read the record, ignoring evidence of
25 other objective findings that are supportive of the DSHS opinions, gave undue
26

27 ¹ The ALJ also addressed a statement from treating PA-C Fine in the same
28 paragraph. Plaintiff has not challenged the ALJ's rejection of Mr. Fine's opinion.

1 weight to the comments about malingering from Mr. Fine, and erred in finding
2 Plaintiff disregarded treatment recommendations. ECF No. 16 at 8-11. He further
3 asserts the ALJ’s rationale only applied to Dr. Crank and Mr. Fine, and that the
4 ALJ did not offer any explicit reasons for rejecting Dr. Palasi’s opinion. *Id.* at 11-
5 12. Defendant argues the ALJ offered sufficient reasons for disregarding both
6 DSHS opinions, and reasonably found the opinions conflicted with the objective
7 findings and evidence of Plaintiff’s malingering, which Dr. Crank and Dr. Palasi
8 were unaware of. ECF No. 17 at 5-7.

9 The Court finds the ALJ did not err. An ALJ may reasonably consider the
10 consistency of an opinion with the rest of the record. 20 C.F.R. § 404.1527(c)(3).
11 As noted by the ALJ, the record contains notations of normal findings and
12 malingering that the sources were not aware of, as well as Plaintiff’s failure to
13 follow up with treatment recommendations. While Plaintiff points to some findings
14 that are supportive of the opinions, the ALJ’s interpretation is reasonable.

15 *b. PA-C Daniel Richmond*

16 An ALJ may discount the opinion of an “other source,” such as a nurse
17 practitioner, if they provide “reasons germane to each witness for doing so.”
18 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

19 Plaintiff’s treating physician’s assistant, Mr. Richmond, completed a DSHS
20 physical functional evaluation noting persistent daily low back pain with left sided
21 radiculopathy, resulting in marked limitations in all basic physical work activities.
22 Tr. 651-52.

23 The ALJ gave minimal weight to Mr. Richmond’s opinion, finding there was
24 inadequate objective support for the assessed limits, indicating Mr. Richmond gave
25 undue credence to Plaintiff’s subjective reporting. Tr. 23. The ALJ further noted
26 Mr. Richmond’s contemporaneous treatment records stated Plaintiff was doing
27 relatively well until a recent exacerbation, and other evidence indicated his
28 condition was adequately managed by conservative treatment. *Id.*

1 Plaintiff argues the ALJ’s discussion disregarded objective evidence that
2 supported Mr. Richmond’s opinion, and thus it was not overly reliant on Plaintiff’s
3 subjective reports. ECF No. 16 at 12-14. Plaintiff also argues his pain was not
4 adequately managed, and he was only okay when he stayed within his activity
5 limits. *Id.* at 14. Defendant argues the ALJ reasonably found the opinion conflicted
6 with the longitudinal evidence and the contemporaneous records noting him to be
7 doing relatively well. ECF No. 17 at 7-8.

8 The Court finds the ALJ did not err. The consistency of a medical opinion
9 with the record as a whole is a germane factor for an ALJ to consider in evaluating
10 the weight due to an “other source.” 20 C.F.R. §§ 416.927(c)(2)(4), 416.927(f).
11 The ALJ reasonably interpreted the record in finding Mr. Richmond’s opinion to
12 be inconsistent with the contemporaneous treatment records noting Plaintiff’s
13 condition to be relatively well-controlled and manageable apart from a recent
14 exacerbation and running out of his medication. Tr. 23, 641, 661.

15 **3. Development of the record**

16 Plaintiff argues the ALJ failed to fulfill her duty to develop the record when
17 she did not obtain evidence of treatment with Dr. Chang, Plaintiff’s orthopedic
18 surgeon. ECF No. 16 at 4-7. Plaintiff asserts his hearing testimony along with
19 records referencing referrals from Dr. Chang were sufficient to put the ALJ on
20 notice that relevant records were missing. *Id.* He further argues that the omission
21 was not harmless, as the ALJ partly discounted his testimony and other opinion
22 evidence based on the lack of treatment, his failure to follow up with the
23 orthopedist, and the lack of severe objective findings. *Id.* at 6.

24 Defendant argues the ALJ’s duty to develop the record is only triggered
25 when there is ambiguous evidence or the record is inadequate to allow for proper
26 evaluation, and that Plaintiff must show a substantial likelihood of prejudice
27 arising from the omitted evidence, which he has not done, as he has not submitted
28 the missing records to the Court or the Appeals Council. ECF No. 17 at 8-9.

1 Defendant further argues any error in rejecting other evidence due to failure to
2 follow up with the orthopedist was harmless as the ALJ offered independent
3 rationale for the rejection of Plaintiff’s subjective reports and the opinion evidence.

4 *Id.*

5 The Court finds the ALJ did not err. The ALJ has an independent duty to
6 make “every reasonable effort” to develop the record. 20 C.F.R. §§ 404.1512,
7 416.912. At the first hearing the ALJ discussed with Plaintiff where he had
8 received treatment and he was unable to remember the names of providers or
9 facilities, but he indicated he would figure them out. Tr. 742-47. At the second
10 hearing, at which point Plaintiff was represented, there was a discussion about
11 outstanding physical therapy records, but not missing records from Dr. Chang. Tr.
12 34-36. Plaintiff mentioned speaking to Dr. Chang about surgery again, but did not
13 indicate he had recently received treatment with him. Tr. 50-51. Because the ALJ
14 was not notified that there were further records missing, the Court finds the ALJ
15 did not err in not seeking out additional records.

16 Furthermore, a plaintiff must show a “substantial likelihood of prejudice”
17 arising from the allegedly omitted evidence, not just a “[m]ere probability.”
18 *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011). While the record indicates
19 Plaintiff was referred to physical therapy and pain management by Dr. Chang, Tr.
20 607, 676, there is no indication of any substantial treatment with Dr. Chang, and it
21 appears his recommendation for surgery remained the same since his 2014
22 recommendation. Tr. 430, 440-41, 676. To the extent Plaintiff argues the ALJ erred
23 in rejecting other opinion evidence and Plaintiff’s subjective statements based on
24 an incomplete record, the Court finds the ALJ offered sufficient other reasons for
25 the rejections, rendering any error harmless at most.

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1 **CONCLUSION**

2 Having reviewed the record and the ALJ’s findings, the Court finds the
3 ALJ’s decision is supported by substantial evidence and free of legal error and is
4 affirmed. Therefore, **IT IS HEREBY ORDERED:**

5 1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is
6 **GRANTED.**

7 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED.**

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

11 **IT IS SO ORDERED.**

12 DATED June 30, 2021.

A handwritten signature in black ink, appearing to read "M", positioned above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE