

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

Jan 24, 2022

SEAN F. MCAVOY, CLERK

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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 TIMOTHY S.,¹

8 Plaintiff,

9 vs.

10 KILOLO KIJAKAZI, ACTING
11 COMMISSIONER OF SOCIAL
SECURITY,²

12 Defendant.

No. 1:20-cv-03114-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 20, 21

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14 _____
15 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
16 identifies them by only their first names and the initial of their last names. *See*
LCivR 5.2(c).

17 ² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9,
18 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo
19 Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further
20 action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 20, 21. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court denies
4 Plaintiff's motion, ECF No. 20, and grants Defendant's motion, ECF No. 21.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
5 416.920(a). Further, a district court “may not reverse an ALJ’s decision on
6 account of an error that is harmless.” *Id.* An error is harmless “where it is
7 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
8 (quotation and citation omitted). The party appealing the ALJ’s decision generally
9 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
10 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,] but cannot,
19 considering his age, education, and work experience, engage in any other kind of
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant’s impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
6 defined generally as the claimant’s ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant’s
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant’s
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant’s age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 “A finding of ‘disabled’ under the five-step inquiry does not automatically
11 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F. 3d 742, 746 (9th
12 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).

13 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
14 determine whether the drug or alcohol addiction is a material factor contributing to
15 the disability. 20 C.F.R. § 416.935(a). To determine whether drug or alcohol
16 addiction is a material factor contributing to the disability, the ALJ must evaluate
17 which of the current physical and mental limitations would remain if the claimant
18 stopped using drugs or alcohol, then determine whether any or all of the remaining
19 limitations would be disabling. 20 C.F.R. § 416.935(b)(2). If the remaining
20 limitations would not be disabling, drug or alcohol addiction is a contributing

1 factor material to the determination of disability. *Id.* If the remaining limitations
2 would be disabling, the claimant is disabled independent of the drug or alcohol
3 addiction and the addiction is not a contributing factor material to disability. *Id.*
4 The claimant has the burden of showing that drug and alcohol addiction is not a
5 contributing factor material to disability. *Parra*, 481 F.3d at 748.

6 Social Security Ruling (“SSR”) 13-2p provides guidance for evaluating
7 whether a claimant’s substance use is material to the disability determination. SSR
8 13-2p, 2013 WL 621536, at *3 (Feb. 20, 2013). It instructs adjudicators to “apply
9 the appropriate sequential evaluation process twice. First, apply the sequential
10 process to show how the claimant is disabled. Then, apply the sequential
11 evaluation process a second time to document materiality[.]” *Id.* at *6.

12 **ALJ’S FINDINGS**

13 On August 3, 2017, Plaintiff applied for Title XVI supplemental security
14 income benefits alleging an amended disability onset date of August 3, 2017.³ Tr.

15 _____
16 ³ Plaintiff previously applied for supplemental security income on November 4,
17 2005, August 21, 2006, and March 26, 2012; all three applications were denied
18 initially and not appealed. Tr. 120. Plaintiff again applied for benefits on
19 November 6, 2013; the application resulted in an ALJ unfavorable decision on
20 November 30, 2015. Tr. 93-110. Plaintiff appealed the unfavorable decision, and

1 18, 118, 332-38. The application was denied initially, and on reconsideration. Tr.
2 233-41, 245-51. Plaintiff appeared before an administrative law judge (ALJ) on
3 September 12, 2019. Tr. 40-92. On October 2, 2019, the ALJ denied Plaintiff's
4 claim. Tr. 15-39.

5 At step one of the sequential evaluation process, the ALJ found Plaintiff has
6 not engaged in substantial gainful activity since August 3, 2017. Tr. 21. At step
7 two, the ALJ found that Plaintiff has the following severe impairments: left tibial
8 plateau fracture; minimal degenerative joint disease of the right knee; moderate
9 degenerative change of the right tibiotalar joint; degenerative changes of the
10 lumbar spine (particularly to the lumbosacral junction); obesity; antisocial
11 personality disorder; attention-deficit/hyperactivity disorder; and unspecified
12 cannabis-related disorder. *Id.*

13 At step three, the ALJ found Plaintiff's impairment, including the substance
14 use disorder, meets Listings 12.08 and 12.11. *Id.* The ALJ found that if Plaintiff
15 discontinued substance use, he would not have an impairment or combination of
16 impairments that meets or medically equals the severity of a listed impairment. Tr.

17 _____
18 the Appeals Council declined to review the decision. Tr. 111-17. This Court
19 granted the defendant's motion for summary judgement on May 27, 2018. Tr.
20 155-72.

1 23. The ALJ then concluded that Plaintiff has the RFC to perform light work with
2 the following limitations:

3 [Plaintiff] can stand for 1 hour and walk for 1 hour at a time, for a
4 total of standing and walking for 4 hours in an 8-hour day; he would
5 need a sit/stand option every two hours for 1-2 minutes at the work
6 station; he could occasionally push/pull leg and foot controls within
7 the weight limitations of light work; he could occasionally stoop,
8 kneel, crouch, crawl, balance, and climb ramps/stairs' he could never
9 climb ladders or scaffolds; he could not drive commercially; he could
10 have no exposure to unprotected heights or hazardous machinery; he
11 could have occasional exposure to humidity, wetness, marked
12 temperature extremes of heat/cold, and heavy industrial-type
13 vibration, and he would miss less than 1 day of work per month.
14 Mentally, he could have superficial contact with the public; could
15 handle normal supervision (i.e., no over-the-shoulder or
16 confrontational type supervision); he needs a routine work setting
17 with little or no changes; and he cannot do fine precision-type work.

11 Tr. 25.

12 At step four, the ALJ found Plaintiff is unable to perform any of his past
13 relevant work. Tr. 32. At step five, the ALJ found that, considering Plaintiff's
14 age, education, work experience, RFC, and testimony from the vocational expert,
15 there were jobs that existed in significant numbers in the national economy that
16 Plaintiff could perform, such as office helper, ticket seller, and storage facility
17 rental clerk. Tr. 33. Therefore, the ALJ concluded Plaintiff was not under a
18 disability, as defined in the Social Security Act, from the date of the application
19 through the date of the decision. Tr. 34.

1 On June 4, 2020, the Appeals Council denied review of the ALJ's decision,
2 Tr. 1-7, making the ALJ's decision the Commissioner's final decision for purposes
3 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him supplemental security income benefits under Title XVI of the Social Security
7 Act. Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly determined Plaintiff's substance use disorder
9 is a material contributing factor to the determination of disability;
- 10 2. Whether the ALJ properly evaluated the medical opinion evidence; and
- 11 3. Whether the ALJ properly evaluated Plaintiff's symptom claims.

12 ECF No. 20 at 2.

13 DISCUSSION

14 **A. Evidence of Drug and Alcohol Abuse (DAA)**

15 Plaintiff challenges the ALJ's finding that his substance abuse materially
16 contributed to his limitations. ECF No. 14 at 4-8; ECF No. 16 at 2-3. Social
17 Security claimants may not receive benefits where DAA is a material contributing
18 factor to disability. 20 C.F.R. § 416.935(b); 42 U.S.C. § 423(d)(2)(c). DAA is a
19 material contributing factor if the claimant would not meet the SSA's definition of
20 disability if the claimant were not using drugs or alcohol. 20 C.F.R. § 416.935(b).

1 Thus, in DAA cases, the regulations require that the ALJ evaluate which of the
2 claimant's current limitations would remain if the claimant stopped using drugs or
3 alcohol and determine whether any or all of the remaining limitations would be
4 disabling. 20 C.F.R. § 416.935(b)(2).⁴

5 For cases involving co-occurring mental disorders, SSR 13-2p(7) states:

- 6 a. Many people with DAA have co-occurring mental disorders; that
7 is, a mental disorder(s) diagnosed by an acceptable medical source
8 in addition to their DAA. We do not know of any research data
9 that we can use to predict reliably that any given claimant's co-
10 occurring mental disorder would improve, or the extent to which it
11 would improve if the claimant were to stop using drugs or alcohol.
12 b. To support a finding that DAA is material, we must have evidence
13 in the case record that establishes that a claimant with a co-
14 occurring mental disorder(s) would not be disabled in the absence
15 of DAA. Unlike cases involving physical impairments, we do not
16 permit adjudicators to rely exclusively on medical expertise and
17 the nature of a claimant's mental disorder.

13 SSR 13-2p, 2013 WL 621536, at *9. Ultimately, Plaintiff has the burden of
14 showing that DAA is not a material contributing factor to disability. *See Parra*,
15 481 F.3d at 748.

17 ⁴ The Ninth Circuit has noted that SSR 13-2p "contemplates abstinence periods of
18 'weeks' or 'months or even longer.'" *See Cothrell v. Berryhill*, 742 F. App'x 232,
19 235 (9th Cir. 2018) (rejecting claimant's allegation that ALJ was required to
20 consider a 6-day period of abstinence).

1 The ALJ found Plaintiff's substance abuse, specifically marijuana use, is a
2 material contributing factor to his disability. Tr. 21-23, 33-34. Dr. Toews testified
3 that Plaintiff's impairments, including substance use, meet listings 12.08 and 12.11
4 in combination, but if he stopped using substances, his impairments would not
5 meet a listing. Tr. 21-24, 62-71. The ALJ found the testimony of medical expert
6 Dr. Toews was persuasive. Tr. 22. The ALJ adopted Dr. Toews' opinion
7 regarding Plaintiff's mental RFC if Plaintiff stopped substance use. Tr. 25, 28.

8 The record provides substantial evidence to support the ALJ's finding that
9 Plaintiff used marijuana throughout the relevant period. Tr. 76-77, 453, 455, 463,
10 480, 486, 566, 569, 585, 602, 637, 640, 643-45, 651-52, 657, 681, 696, 720.
11 Plaintiff has been diagnosed with an unspecified cannabis-related disorder. Tr.
12 454. The ALJ considered Dr. Toews' opinion as well as Dr. Marks' opinion in
13 finding that Plaintiff meets a listing with substance use. Tr. 22-23. The ALJ noted
14 that during Dr. Marks' examination, Plaintiff had multiple abnormalities, but Dr.
15 Marks stated Plaintiff may have been under the influence of marijuana or
16 methamphetamine during the examination. Tr. 22-23, 455. The ALJ found that if
17 Plaintiff stopped using substances, he would not be disabled, and cited to Dr.
18 Toews' opinion as support, as well as normal mental status examinations, and
19 Plaintiff's ability to previously obtain his GED. Tr. 23-24. The ALJ found there is
20 not a clear period of sustained absence in the record, but there were periods of

1 reported reduced usage during which Plaintiff had improvement. Tr. 24. The ALJ
2 found that when Plaintiff reported using substances weekly, instead of daily, he
3 denied issues with attention or listening to instructions. *Id.* (citing Tr. 672).
4 Plaintiff also had normal mental status examinations throughout the record and has
5 reported being able to play video games for a few hours at a time. Tr. 24 (citing,
6 e.g., Tr. 460, 464, 467-68, 477, 512, 519).

7 First, Plaintiff argues the ALJ erred by relying exclusively on Dr. Toews'
8 opinion in finding DAA is material. ECF No. 20 at 5-6. However, the ALJ
9 considered Dr. Toews' opinion, as well as the objective medical evidence,
10 including the multiple normal mental status examinations in the record, medical
11 evidence of improvement during periods of reduced usage, and Plaintiff's
12 disinterest in pursuing treatment. Tr. 21-32. Next, Plaintiff argues the ALJ erred
13 in failing to identify a period of abstinence, ECF No. 20 at 5, ECF No. 22 at 2-3,
14 however, Plaintiff does not point to any period of abstinence that the ALJ failed to
15 consider. The burden is on the Plaintiff to demonstrate that DAA is not a material
16 contributing factor to disability. *See Parra*, 481 F.3d at 748; *Owen v. Astrue*, No.
17 CV-09-183-JPH, 2010 WL 2079871, at *6 (E.D. Wash. May 19, 2010) (citing
18 *Karol v. Astrue*, 2009 No. WL 3160352 (E.D. Wash. Sept. 29, 2009)). Plaintiff's
19 argument that an ALJ has an affirmative duty to cite to evidence from a period of
20 abstinence is inconsistent with the holding in *Parra*. The Ninth Circuit rejected the

1 argument that the burden of proof can be shifted to the Commissioner on the
2 materiality issue, because such an interpretation runs contrary to the purpose of the
3 statute. *Parra*, 481 F.3d at 750. Such an interpretation of the ruling would mean a
4 claimant who presents inconclusive evidence of materiality would have no
5 incentive to stop using substances because abstinence may resolve his disabling
6 limitations and would cause his claim to be rejected. *Id.*

7 While SSR 13-2p was enacted after *Parra*, courts have continued to find that
8 despite the requirements set forth in SSR 13-2p, claimants continue to have the
9 burden of proof in demonstrating their substance use is not a material contributing
10 factor to their disability, and that a claimant setting forth ambiguous evidence of
11 the materiality does not satisfy the burden. *See, e.g., Garner v. Colvin*, 626 F.
12 App'x 699, 701 (9th Cir. 2015); *see also Chavez v. Colvin*, No. 3:14-CV-01178-JE,
13 2016 WL 8731796, at *5 (D. Or. July 25, 2016), *report and recommendation*
14 *adopted*, No. 3:14-CV-01178-JE, 2016 WL 8738159 (D. Or. Aug. 19, 2016); *Quill*
15 *v. Colvin*, No. 2:13-CV-3097-JTR, 2014 WL 3608894, at *9 (E.D. Wash. July 22,
16 2014). In *Quill*, Plaintiff's counsel previously argued an ALJ erred in the DAA
17 analysis, when there was no clear period of sobriety; the court noted that SSR 13-
18 2p explicitly states that the burden remains with the claimant throughout the DAA
19 materiality analysis, and that SSR 13-2p does not require a period of abstinence.
20 *Quill*, No. 2:13-CV-3097-JTR, 2014 WL 3608894, at *9. Similarly, here, although

1 there is no period of abstinence, Plaintiff has not met his burden in demonstrating
2 his substance use is not material.

3 Lastly, Plaintiff argues the ALJ cited to insufficient evidence and
4 inaccurately portrayed the evidence in finding DAA is material. ECF No. 20 at 6-
5 10. Plaintiff argues he did not have a period of abstinence, and contrary to the
6 ALJ's finding that there was a period during which Plaintiff decreased his
7 marijuana use, Plaintiff argues he did not in fact reduce his use and continued to
8 use marijuana daily. *Id.* Plaintiff contends the ALJ's analysis of the evidence fails
9 to cite to evidence that demonstrates his impairments improved to less-than-
10 marked during periods when he reduced or abstained from marijuana use. *Id.*
11 Again, Plaintiff shifts the burden to the Commissioner, contrary to the holding in
12 *Parra*. Further, SSR 13-2p does not require a period of sobriety, as discussed
13 *supra*.

14 The ALJ provided an analysis of the evidence and considered Dr. Toews'
15 opinion in determining that without substance use Plaintiff's impairments would
16 not be disabling. Tr. 23-31. Regardless of marijuana use, Plaintiff often had many
17 normal mental status examination findings and notes of normal
18 psychiatric/behavioral findings, including normal mood, no sleep disturbances, no
19 nervousness/anxiousness, normal mood, appearance, speech, orientation, behavior,
20 affect, attitude, memory, fund of knowledge, concentration, thoughts, insight, and

1 judgment. *See, e.g.*, Tr. 463-64, 468, 477, 514, 575-76. Plaintiff argues some of
2 the records cited to by the ALJ fall outside of the relevant period, ECF No. 20 at 9,
3 however the records fall as little as one month prior to the amended alleged onset
4 date, and several records fall within the relevant time period. In June 2018,
5 Plaintiff reported on one page that he was not spending a lot of time using alcohol
6 or drugs, and checked the box that he was using substances weekly, though on the
7 next page he reported daily use; the ALJ noted that during that time when he
8 denied spending a lot of time using substances, he also denied significant
9 symptoms of anxiety and depression. Tr. 24, 672-73.

10 The ALJ reasonably relied on Dr. Toews' opinion and the objective
11 evidence in finding DAA is material. While Plaintiff also argues the ALJ erred in
12 rejecting medical opinions in which the providers opined DAA was not material,
13 the ALJ's rejection of the opinions were supported by substantial evidence as
14 discussed *infra*. Plaintiff is not entitled to remand on these grounds.

15 **B. Medical Opinion Evidence**

16 Plaintiff contends the ALJ erred in his consideration of the opinions of N.K.
17 Marks, Ph.D.; Luci Carstens, Ph.D., P.S.; David Morgan, Ph.D.; and Irvin Belzer,
18 M.D. ECF No. 20 at 10-16.

19 As an initial matter, for claims filed on or after March 27, 2017, new
20 regulations apply that change the framework for how an ALJ must evaluate

1 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*
2 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20
3 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give
4 any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*,
5 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §
6 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all
7 medical opinions or prior administrative medical findings from medical sources.
8 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of
9 medical opinions and prior administrative medical findings include supportability,
10 consistency, relationship with the claimant (including length of the treatment,
11 frequency of examinations, purpose of the treatment, extent of the treatment, and
12 the existence of an examination), specialization, and “other factors that tend to
13 support or contradict a medical opinion or prior administrative medical finding”
14 (including, but not limited to, “evidence showing a medical source has familiarity
15 with the other evidence in the claim or an understanding of our disability
16 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-
17 (5).

18 Supportability and consistency are the most important factors, and therefore
19 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
20 416.920c(b)(2). Supportability and consistency are explained in the regulations:

1 (1) *Supportability*. The more relevant the objective medical evidence
2 and supporting explanations presented by a medical source are to
3 support his or her medical opinion(s) or prior administrative
4 medical finding(s), the more persuasive the medical opinions or
5 prior administrative medical finding(s) will be.

6 (2) *Consistency*. The more consistent a medical opinion(s) or prior
7 administrative medical finding(s) is with the evidence from other
8 medical sources and nonmedical sources in the claim, the more
9 persuasive the medical opinion(s) or prior administrative medical
10 finding(s) will be.

11 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
12 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
13 two or more medical opinions or prior administrative findings “about the same
14 issue are both equally well-supported ... and consistent with the record ... but are
15 not exactly the same,” the ALJ is required to explain how “the other most
16 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
17 § 416.920c(b)(3).

18 *1. Dr. Marks and Dr. Carstens*

19 On August 24, 2017, Dr. Marks examined Plaintiff and rendered an opinion
20 on his functioning. Tr. 452-57. Dr. Marks diagnosed Plaintiff with unspecified
personality disorder, attention-deficit/hyperactivity disorder, combined
presentation, and unspecified cannabis-related disorder. Tr. 454. Dr. Marks
opined Plaintiff has no/mild limitations in his ability to understand, remember, and
persist in tasks by following very short and simple instructions; moderate

1 limitations in his ability to understand, remember, and persist in tasks by following
2 detailed instructions, learn new tasks, perform routine tasks without special
3 supervision, ask simple questions or request assistance, and complete a normal
4 workday/workweek without interruptions from psychologically-based symptoms;
5 and marked limitations in his ability to perform activities within a schedule,
6 maintain regular attendance, and be punctual within customary tolerances without
7 special supervision, adapt to changes in a routine work setting, make simple work-
8 related decisions, be aware of normal hazards and take appropriate precautions,
9 communicate and perform effectively in a work setting, maintain appropriate
10 behavior in a work setting, and set realistic goals and plan independently. Tr. 454-

11 55. Dr. Marks opined Plaintiff's impairments would last following 60 days of
12 sobriety, and the limitations were expected to last 12 months with treatment. Tr.
13 455.

14 On September 7, 2017, Dr. Carstens examined Plaintiff and rendered an
15 opinion on his functioning. Tr. 545-49. Dr. Carstens diagnosed Plaintiff with
16 attention-deficit/hyperactivity disorder and other specified personality disorder.
17 Tr. 547. Dr. Carstens opined Plaintiff is not limited in his ability to understand,
18 remember and persist in tasks by following very short and simple instructions;
19 moderate limitations in his ability to understand, remember, and persist in tasks by
20 following detailed instructions, learn new tasks, perform routine tasks without

1 special supervision, ask simple questions or request assistance, and complete a
2 normal workday/workweek without interruptions from psychologically-based
3 symptoms; and marked limitations in his ability to perform activities within a
4 schedule, maintain regular attendance and be punctual within customary
5 tolerances, adapt to changes in a routine work setting, make simple work-related
6 decisions, be aware of normal hazards and take appropriate precautions,
7 communicate effectively in a work setting, maintain appropriate behavior in a
8 work setting, and set goals and plan independently. Tr. 546. Dr. Carstens opined
9 Plaintiff's impairments were not primary due to alcohol or drug use, and opined
10 the impairments were expected to last 24 months. Tr. 548. The ALJ found Dr.
11 Marks and Dr. Carstens' opinions were not persuasive. Tr. 30-31.

12 First, the ALJ noted that Dr. Marks' suspected Plaintiff was under the
13 influence of drugs at the time of the evaluation. Tr. 31. In conducting a DAA
14 analysis, the "key factor" for the ALJ to consider is whether the claimant would
15 still be disabled if the claimant stopped using drugs or alcohol. 20 C.F.R. §
16 416.935(b)(2). Therefore, the fact that a medical report reflects a claimant's
17 functioning while using drugs or alcohol is a valid consideration to make in
18 evaluating a medical opinion. *See Chavez*, No. 3:14-cv-01178-JE, 2016 WL
19 8731796, at *8. Dr. Marks stated, "[h]e may have been under the influence of
20 meth or marijuana, although it could not be completely determined. He needs a

1 [chemical dependency] evaluation and treatment.” Tr. 455. Dr. Marks did not
2 opine as to whether the current impairments were primarily the result of
3 alcohol/drug use within the last 60 days but opined the impairments would persist
4 following 60 days of sobriety. *Id.* The ALJ noted that Plaintiff’s behavior at Dr.
5 Marks’ examination, when it was suspected he was under the influence of a
6 substance, was different and more impaired than his behavior at appointments
7 where there is no documentation of substance use. Tr. 31. While Plaintiff argues
8 this reason was not valid, because the cited records where Plaintiff had normal
9 presentation were visits for physical symptoms, and Dr. Marks’ examination was
10 consistent with Dr. Morgan’s, Plaintiff does not point to any other visits where
11 Plaintiff exhibited the behavior documented by Dr. Marks, such as the
12 disorganization, agitated affect, nor off-task behavior. ECF No. 20 at 11. While
13 Dr. Morgan also noted Plaintiff was verbose, fidgety, and went from topic to topic
14 with interruptions, Dr. Morgan also found Plaintiff was cooperative, with a normal
15 mood and affect, and the other portions of the examination were normal as well,
16 including memory, perception, and concentration. Tr. 572-75. While the ALJ
17 relied on appointments for physical complaints to discount the opinion, Plaintiff
18 has not had any ongoing mental health care during the relevant period; thus, there
19 are no mental health records to consider beyond the two examinations. The ALJ’s
20 finding that Dr. Marks’ opinion was not persuasive because Dr. Marks suspected

1 Plaintiff was under the influence of drugs at the time of the evaluation is supported
2 by substantial evidence.

3 Second, the ALJ found Dr. Marks' and Dr. Carstens' opinions that
4 Plaintiff's degree of limitations due to his impairments would persist in the
5 absence of substance abuse was not consistent with the record. Tr. 31.

6 Consistency is one of the most important factors an ALJ must consider when
7 determining how persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2).

8 The more consistent an opinion is with the evidence from other sources, the more
9 persuasive the opinion is. 20 C.F.R. § 416.920c(c)(2). As discussed *supra*, the

10 ALJ noted Plaintiff had normal presentation at many examinations. Tr. 31.

11 Plaintiff reported not feeling that he needs mental health treatment, and he refused
12 to discontinue marijuana use to continue with treatment, thus he did not receive
13 any ongoing mental health care. *Id.*, Tr. 654, 656, 701. While Plaintiff argues Dr.

14 Toews testified Plaintiff's sense of entitlement due to his personality disorder is

15 likely part of his rationale for being disinterested in treatment, ECF No. 20 at 12,

16 Tr. 70, Plaintiff does not point to evidence in the record that is consistent with Dr.

17 Marks' opinion that Plaintiff has marked limitations. The ALJ's finding that Dr.

18 Marks and Dr. Carstens' opinions were inconsistent with the record is supported by
19 substantial evidence.

1 2. *Dr. Morgan*

2 On June 20, 2019, Dr. Morgan examined Plaintiff and rendered an opinion
3 on Plaintiff's functioning. Tr. 572-76. Dr. Morgan diagnosed Plaintiff with
4 unspecified attention-deficit/hyperactivity disorder and antisocial personality
5 disorder. Tr. 573. Dr. Morgan opined Plaintiff has no/mild limitation in his ability
6 to understand, remember, and persist in tasks by following very short and simple
7 instructions; moderate limitations in his ability to learn new tasks; marked
8 limitations in his ability to understand, remember, and persist in tasks by following
9 detailed instructions, perform activities within a schedule, maintain regular
10 attendance, and be punctual within customary tolerances without special
11 supervision, perform routine tasks without special supervision, make simple work-
12 related decision, be aware of normal hazards and take appropriate precautions, ask
13 simple questions or request assistance, maintain appropriate behavior in a work
14 setting, and set realistic goals and plan independently; and sever limitations in his
15 ability to adapt to changes in a routine work setting, communicate and perform
16 effectively in a work setting, and complete a normal workday/workweek without
17 interruptions from psychologically-based symptoms. Tr. 574. He opined
18 Plaintiff's impairments overall caused marked limitations, the limitations are not
19 primarily the result of substance use, and the limitations were expected to last 12
20 months with treatment. Tr. 574-75. Dr. Morgan also opined Plaintiff's ADHD is

1 marked in severity, while his antisocial personality is marked to severe. Tr. 573.

2 The ALJ found Dr. Morgan's opinion was not persuasive. Tr. 31.

3 First, the ALJ found Dr. Morgan's opinion was inconsistent with his
4 examination findings. *Id.* Supportability is one of the most important factors an
5 ALJ must consider when determining how persuasive a medical opinion is. 20
6 C.F.R. § 416.920c(b)(2). The more relevant objective evidence and supporting
7 explanations that support a medical opinion, the more persuasive the medical
8 opinion is. 20 C.F.R. § 416.920c(c)(1). While Dr. Morgan opined Plaintiff has
9 multiple marked and severe limitations, Dr. Morgan's examination documented
10 normal grooming, speech, attitude, behavior, mood, affect, thoughts, orientation,
11 perception, memory, fund of knowledge, concentration, abstract thought, insight,
12 and judgment. Tr. 31, 574-76. Plaintiff argues Dr. Morgan's opinion was
13 supported by his examination, because Plaintiff talked almost non-stop during the
14 interview, interrupted the examiner, jumped topics, and was fidgety. ECF No. 20
15 at 13. However, despite being fidgety and having an abnormal communication
16 style, Plaintiff still had normal examination findings. Tr. 574-76. While Dr.
17 Morgan opined Plaintiff has marked limitations in his ability to understand,
18 remember, and persist in tasks by following detailed instructions, this is
19 inconsistent with Plaintiff's generally normal examination, including normal
20 memory and concentration. *Id.* Although Dr. Morgan provided a narrative of

1 Plaintiff's history, and description of Plaintiff's symptoms, he did not provide an
2 explanation of his opinion. Tr. 572-76. The ALJ's finding that Dr. Morgan's
3 opinions are inconsistent with his examination is supported by substantial
4 evidence.

5 Second, the ALJ found Dr. Morgan's opinion appeared to be primarily based
6 on Plaintiff's own subjective reports. Tr. 31. As supportability is one of the most
7 important factors an ALJ must consider when determining how persuasive a
8 medical opinion is, 20 C.F.R. § 416.920c(b)(2), a medical provider's reliance on a
9 Plaintiff's unsupported self-report is a relevant consideration when determining the
10 persuasiveness of the opinion. The ALJ found that Dr. Morgan's opinion appears
11 to be based on Plaintiff's subjective reports, as Dr. Morgan's examination was
12 largely normal. Tr. 31. Plaintiff argues the opinion was also based on Dr.
13 Morgan's review of records, his examination, and Plaintiff's history. ECF No. 20
14 at 13-14. However, the notes from Dr. Morgan indicate he relied on Plaintiff's
15 self-report; he wrote Plaintiff's ADHD causes Plaintiff to be "often forgetful," and
16 he is "easily distracted," but Plaintiff had normal memory and concentration on
17 examination. Tr. 573, 576. Dr. Morgan wrote throughout the history sections that
18 his notes were based on Plaintiff's reports. Tr. 572-73. Dr. Morgan noted that
19 Plaintiff reported a history of ADHD, and Plaintiff stated he has challenges
20

1 remembering things and does not pay attention to detail. Tr. 572. These notes
2 support the ALJ's conclusion that the opinion is based on Plaintiff's self-report.

3 Plaintiff argues the records Dr. Morgan reviewed support his opinion. ECF
4 No. 20 at 13-14. However, at Dr. Marks' examination, Plaintiff again had multiple
5 normal findings, including normal orientation, memory, fund of knowledge,
6 abstract thought, concentration, and insight/judgment, although he also had
7 abnormal perception and thought content. Tr. 456-57. Plaintiff also argues Dr.
8 Morgan relied on Plaintiff's criminal history in finding Plaintiff's antisocial
9 personality disorder symptoms are marked to severe, ECF No. 20 at 14-15,
10 however Dr. Morgan's notes also focused on Plaintiff's self-reported antisocial
11 behavior, such as his reports of not liking people and not wanting to be around
12 people, Tr. 572-73. The ALJ's finding that Dr. Morgan appears to have relied on
13 Plaintiff's self-report is supported by substantial evidence.

14 *3. Dr. Belzer*

15 On September 12, 2019, Dr. Belzer testified at Plaintiff's hearing and
16 rendered an opinion on his functioning. Tr. 44-58. Dr. Belzer testified that the
17 records contain treatment for bilateral knee impairments, an ankle impairment, a
18 back impairment, and obesity. Tr. 45-48. Dr. Belzer opined Plaintiff's conditions
19 do not meet or equal a listing. Tr. 48. Dr. Belzer opined Plaintiff could lift/carry
20 20 pounds occasionally and 10 pounds frequently, sit for up to six hours with a one

1 to two-minute stretch break at the workstation every two hours; stand/walk for one
2 hour at a time for up to four hours total in a day; he can occasionally climb
3 ramps/stairs, stoop, kneel, crouch, use foot controls, and crawl; he should never
4 climb ladders/scaffolds; he should not work around unprotected heights, moving
5 mechanical parts, nor operate a commercial motor vehicle; and he can have
6 occasional exposure to humidity, wetness, extreme heat, cold, and vibration. Tr.
7 49-53. The ALJ adopted Dr. Belzer's opinion. Tr. 28.

8 Plaintiff argues the ALJ erred in adopting Dr. Belzer's opinion, because the
9 opinion was inconsistent with the record. ECF No. 20 at 15-16. Dr. Belzer
10 testified that he did not see documentation that a foreign body fragment remained
11 in the left knee, but if the fragment existed, then he would expect Plaintiff to have
12 significant pain. Tr. 56-57. Plaintiff argues the records demonstrate Plaintiff has a
13 fragment in his left knee, as a CT scan from May 2017 documents a fragment.
14 ECF No. 20 at 15-16 (citing Tr. 479). However, Defendant argues that any error in
15 crediting Dr. Belzer's opinion is harmless, because after being asked about the
16 foreign body fragment in the left knee, Dr. Belzer was asked if someone with
17 "these conditions" and the "resulting pain" would miss work on the days their pain
18 is more significant. Tr. 57. Dr. Belzer testified that he would expect the person to
19 miss less than one day per month. *Id.* The ALJ incorporated the limitation into the
20 RFC, and the vocational expert testified that there are jobs available for someone

1 who would miss less than one day per month. Tr. 84. Plaintiff does not provide a
2 response to Defendant’s argument. ECF No. 22 at 11-12. Thus, any error in
3 crediting Dr. Belzer’s opinion would be harmless. *See Molina*, 674 F.3d at 1115.
4 Plaintiff is not entitled to remand on these grounds.

5 **C. Plaintiff’s Symptom Claims**

6 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
7 convincing in discrediting his symptom claims. ECF No. 20 at 16-21. An ALJ
8 engages in a two-step analysis to determine whether to discount a claimant’s
9 testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at *2.
10 “First, the ALJ must determine whether there is objective medical evidence of an
11 underlying impairment which could reasonably be expected to produce the pain or
12 other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation marks omitted).
13 “The claimant is not required to show that [the claimant’s] impairment could
14 reasonably be expected to cause the severity of the symptom [the claimant] has
15 alleged; [the claimant] need only show that it could reasonably have caused some
16 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

17 Second, “[i]f the claimant meets the first test and there is no evidence of
18 malingering, the ALJ can only reject the claimant’s testimony about the severity of
19 the 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

1 omitted). General findings are insufficient; rather, the ALJ must identify what
2 symptom claims are being discounted and what evidence undermines these claims.
3 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
4 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
5 explain why it discounted claimant’s symptom claims)). “The clear and
6 convincing [evidence] standard is the most demanding required in Social Security
7 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
8 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

9 Factors to be considered in evaluating the intensity, persistence, and limiting
10 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
11 duration, frequency, and intensity of pain or other symptoms; 3) factors that
12 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
13 side effects of any medication an individual takes or has taken to alleviate pain or
14 other symptoms; 5) treatment, other than medication, an individual receives or has
15 received for relief of pain or other symptoms; 6) any measures other than treatment
16 an individual uses or has used to relieve pain or other symptoms; and 7) any other
17 factors concerning an individual’s functional limitations and restrictions due to
18 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
19 416.929(c). The ALJ is instructed to “consider all of the evidence in an
20

1 individual's record," to "determine how symptoms limit ability to perform work-
2 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

3 The ALJ found that if Plaintiff stopped substance use, Plaintiff's medically
4 determinable impairments could reasonably be expected to cause some of the
5 alleged symptoms, but that Plaintiff's statements concerning the intensity,
6 persistence, and limiting effects of his symptoms were not entirely consistent with
7 the evidence. Tr. 26.

8 *1. Inconsistent Objective Medical Evidence*

9 The ALJ found Plaintiff's symptom claims were inconsistent with the
10 objective medical evidence. Tr. 26-29. An ALJ may not discredit a claimant's
11 symptom testimony and deny benefits solely because the degree of the symptoms
12 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261
13 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
14 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400
15 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a
16 relevant factor, along with the medical source's information about the claimant's
17 pain or other symptoms, in determining the severity of a claimant's symptoms and
18 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

19 First, the ALJ found Plaintiff's physical symptoms were not as severe as
20 alleged. Tr. 26-28. While Plaintiff complains of significant limitations due to his

1 knee impairments, the ALJ noted that imaging demonstrated abnormalities, but
2 Plaintiff continued to smoke despite being advised it would affect his knee healing,
3 and Plaintiff continued to have a normal gait. Tr. 27 (citing Tr. 440, 460, 462,
4 478-79, 482. Plaintiff's knee was stable on examination in June 2017, and he was
5 encouraged to have physical therapy, Tr. 27 (citing Tr. 475, 520), and in
6 September 2017, Plaintiff's lower extremity examination was normal, Tr. 27
7 (citing Tr. 579). Plaintiff complained of ankle pain, but imaging showed only
8 moderate changes and his June 2017 examination demonstrated decreased range of
9 motion but an otherwise normal examination, Tr. 27 (citing Tr. 468, 502), and in
10 September 2017, Plaintiff's ankle range of motion was normal, Tr. 27 (citing Tr.
11 578). Plaintiff complained of back pain, and while imaging demonstrated some
12 lumbar degenerative changes, disc spacing was normal and there were no acute or
13 high-grade lesions, and Plaintiff's thoracic spine was normal. Tr. 27-28 (citing Tr.
14 582, 614-15). Plaintiff argues the ALJ erred in failing to consider his subjective
15 pain, however the ALJ reasonably considered the objective evidence.

16 Second, the ALJ found Plaintiff's psychological symptoms were not as
17 severe as alleged. Tr. 28-29. Plaintiff has had minimal mental health treatment
18 through the relevant period, as discussed further *infra*. Tr. 28. At the examination
19 where Plaintiff had the most abnormalities on examination, the provider stated
20 Plaintiff may be under the influence of methamphetamine or marijuana. Tr. 22-23

1 (citing Tr. 454-56). At another visit when a provider thought Plaintiff was under
2 the influence, Plaintiff had difficulty focusing. Tr. 23 (citing Tr. 652). At visits
3 where Plaintiff was not documented as potentially under the influence of a
4 substance, Plaintiff was generally noted as alert and oriented, with a normal mood,
5 affect, behavior, judgment, and thought content. Tr. 23 (citing Tr. 464, 466-67,
6 477, 514, 519, 583, 586, 609, 636, 638). This was a clear and convincing reason,
7 along with the other reasons offered, to reject Plaintiff's symptom claims.

8 *2. Activities of Daily Living*

9 The ALJ found Plaintiff's symptom claims were inconsistent with Plaintiff's
10 activities of daily living. Tr. 27-31. The ALJ may consider a claimant's activities
11 that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can
12 spend a substantial part of the day engaged in pursuits involving the performance
13 of exertional or non-exertional functions, the ALJ may find these activities
14 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
15 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to
16 be eligible for benefits, the ALJ may discount a claimant's symptom claims when
17 the claimant reports participation in everyday activities indicating capacities that
18 are transferable to a work setting" or when activities "contradict claims of a totally
19 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

1 Despite complaints of significant knee symptoms, Plaintiff reported going
2 on a “really long” walk and that it felt really good, and he has reported being able
3 to walk a mile and do activities around the house. Tr. 27 (citing Tr. 130, 462).
4 While he alleges he has difficulty being around others, he also reported taking the
5 bus to go to a World Cup game. Tr. 29 (citing Tr. 604). Plaintiff reported being
6 able to play video games for a few hours at a time. Tr. 30 (citing Tr. 640); Tr. 460.
7 Plaintiff can go places such as the grocery store by himself. Tr. 31 (citing Tr. 377).
8 Plaintiff has reported being able to help clean the house and do household chores.
9 Tr. 27 (citing Tr. 471). Plaintiff argues he injured himself doing chores, but
10 Plaintiff reported he “works for his parents cleaning their house and doing
11 household chores,” and on one occasion, he stated he pulled his hamstring. Tr.
12 471. Plaintiff reported being able to prepare simple meals, use a weed eater and
13 lawn mower twice per week, do laundry, and handle money. Tr. 375-77, 479-80.
14 Plaintiff argues his activities are not inconsistent with his allegations. ECF No. 20
15 at 19-20. However, the ALJ reasonably found Plaintiff’s activities are inconsistent
16 with his allegations of disabling limitations. This was a clear and convincing
17 reason, supported by substantial evidence, to reject Plaintiff’s symptom claims.

18 3. *Lack of Treatment*

19 The ALJ found Plaintiff’s symptom claims were inconsistent with his lack of
20 treatment. Tr. 28. An unexplained, or inadequately explained, failure to seek

1 treatment or follow a prescribed course of treatment may be considered when
2 evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638
3 (9th Cir. 2007). And evidence of a claimant's self-limitation and lack of
4 motivation to seek treatment are appropriate considerations in determining the
5 credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240
6 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, *3 (9th
7 Cir. 2009) (unpublished opinion) (considering why plaintiff was not seeking
8 treatment). When there is no evidence suggesting that the failure to seek or
9 participate in treatment is attributable to a mental impairment rather than a
10 personal preference, it is reasonable for the ALJ to conclude that the level or
11 frequency of treatment is inconsistent with the alleged severity of complaints.
12 *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental
13 health treatment is partly due to a claimant's mental health condition, it may be
14 inappropriate to consider a claimant's lack of mental health treatment when
15 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100
16 F.3d 1462, 1465 (9th Cir. 1996).

17 Plaintiff has not received any ongoing mental health treatment throughout
18 the relevant adjudicative period. Tr. 28. During the only treatment he received,
19 Plaintiff reported he was being seen to continue receiving benefits. *Id.* (citing Tr.
20 642, 645, 651, 681). Plaintiff reported not being interested in mental health

1 treatment and not feeling he needed it. Tr. 28 (citing Tr. 629, 642, 654, 656).
2 Plaintiff refused to attend groups or weekly individual sessions. Tr. 28 (citing Tr.
3 642). Plaintiff was discharged from treatment due to his lack of interest in
4 engaging in treatment. Tr. 28 (citing Tr. 569). Plaintiff also refused to discontinue
5 smoking marijuana to comply with chemical dependency treatment. Tr. 657.
6 Plaintiff argues the ALJ erred in rejecting Plaintiff's statements due to his lack of
7 treatment, because the ALJ failed to consider that Plaintiff's personality disorder
8 impacted his motivation to obtain treatment. ECF No. 20 at 18-19. However, any
9 error in the ALJ failing to consider the reasons Plaintiff did not seek treatment is
10 harmless, as the ALJ offered other supported reasons to reject Plaintiff's symptom
11 claims. *See Molina*, 674 F.3d at 1115.

12 Further, the ALJ also considered that Plaintiff only sought mental health
13 treatment for the purpose of obtaining benefits. Tr. 28. Evidence of being
14 motivated by secondary gain is sufficient to support an ALJ's rejection of
15 testimony evidence. *See Matney ex rel. Matney*, 981 F.2d at 1020. Plaintiff stated
16 several times that he was only attending appointments to obtain financial benefits.
17 Tr. 28, 640, 642, 645. Plaintiff asked for a letter of completion to be sent to his
18 case worker, although he had not completed treatment, so he could continue
19 receiving benefits. Tr. 642, 645. This was a clear and convincing reason,
20 supported by substantial evidence, to reject Plaintiff's claims.

1 4. *Work History*

2 The ALJ found Plaintiff's symptom claims were inconsistent with his work
3 history. Tr. 29. Evidence of a poor work history that suggests a claimant is not
4 motivated to work is a permissible reason to discredit a claimant's testimony that
5 he is unable to work. *Thomas*, 278 F.3d at 959; SSR 96-7 (factors to consider in
6 evaluating credibility include "prior work record and efforts to work"); *Smolen v.*
7 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); 20 C.F.R. § 416.929 (work record can
8 be considered in assessing credibility).

9 Plaintiff worked minimally and inconsistently even before his amended
10 alleged onset date. Tr. 29 (citing Tr. 353-62, 340-44). Plaintiff has also reported
11 an extensive criminal history and multiple periods of incarceration and has
12 admitted his criminal history contributes to his difficulty working. Tr. 29 (citing
13 Tr. 396, 454, 573). The ALJ noted that the evidence raises the question as to
14 whether Plaintiff's unemployment is due to his alleged disabling impairments. Tr.
15 29. Plaintiff argues his criminal history and disability in combination prevent him
16 from working and thus this was not a clear and convincing reason to reject his
17 symptom claims. ECF No. 20 at 21-22. Plaintiff had multiple years prior to the
18 alleged onset date during which he had zero earnings, and Plaintiff has never
19 earned SGA for an entire year. *See* Tr. 340-44. This finding is supported by
20

1 substantial evidence and was a clear and convincing reason to discount Plaintiff's
2 symptom complaints. Plaintiff is not entitled to remand on these grounds.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

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

7 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
8 Defendant and update the docket sheet.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.

10 3. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
11 **GRANTED**.

12 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED January 24, 2022.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20