

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

**Jun 27, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RANDALL G.,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of the Social Security  
Administration,<sup>1</sup>

Defendant.

No: 1:21-CV-03076-LRS

ORDER GRANTING, IN PART,  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 15, 20. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Kathryn Higgs. Defendant is represented by Special Assistant United States Attorney Lisa Goldoftas. The

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<sup>1</sup>Kilolo 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 Court, having reviewed the administrative record and the parties' briefing, is fully  
2 informed. For the reasons discussed below, the Court **GRANTS** Plaintiff's Motion  
3 for Summary Judgment, ECF No. 15, **DENIES** Defendant's Motion for Summary  
4 Judgment, ECF No. 20, and **REMANDS** the case for to the Commissioner for  
5 additional proceedings.

### 6 **JURISDICTION**

7 Plaintiff Randall G.<sup>2</sup> filed an application for Disability Insurance Benefits  
8 (DIB) on May 26, 2015, Tr. 109, alleging disability since February 15, 2012, Tr.  
9 318, due to numbness in both legs, severe lower back pain, severe bilateral hip  
10 pain, right knee pain, depression, and sleep issues, Tr. 361.<sup>3</sup> Benefits were denied  
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12 <sup>2</sup>In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's  
13 first name and last initial, and, subsequently, Plaintiff's first name only, throughout  
14 this decision.

15 <sup>3</sup>The Court notes that Plaintiff had a prior application for DIB dated July 18,  
16 2013, alleging disability as of December 5, 2006. Tr. 304-12. There is no  
17 evidence in the record indicating the final determination of the application. The  
18 ALJ made her determination addressing the period from Plaintiff's alleged onset  
19 date, February 15, 2012, through Plaintiff's date last insured, June 30, 2017. Tr.  
20 15-27. Therefore, the ALJ's decision is a de facto reopening of the prior  
21 application. *See Lewis v. Apfel*, 236 F.3d 503, 510 (9th Cir. 2001).

1 initially, Tr. 162-68, and upon reconsideration, Tr. 170-76. A hearing before  
2 Administrative Law Judge (“ALJ”) Eric Basse was conducted on March 23, 2018.  
3 Tr. 41-77. Plaintiff was represented by an attorney and testified at the hearing. *Id.*  
4 The ALJ also took the testimony of vocational expert Theresa Wolford. *Id.* The  
5 ALJ denied benefits on May 24, 2018. Tr. 136-47. The Appeals Council granted  
6 Plaintiff’s request for review and remanded the case back to the ALJ on June 28,  
7 2018. Tr. 155-59.

8 A second hearing was held on March 10, 2020, before ALJ Virginia M.  
9 Robinson. Tr. 78-102. The ALJ took the testimony of Plaintiff and vocational  
10 expert, Kimberly Mullinax. *Id.* The ALJ entered an unfavorable decision on  
11 March 30, 2020. Tr. 15-27. The Appeals Council denied Plaintiff’s request for  
12 review on April 29, 2021. Tr. 1-5. Therefore, the ALJ’s March 30, 2020 decision  
13 became the final decision of the Commissioner. This case is now before this Court  
14 pursuant to 42 U.S.C. § 405(g). ECF No. 1.

## 15 **BACKGROUND**

16 The facts of the case are set forth in the administrative hearing and  
17 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.  
18 Only the most pertinent facts are summarized here.

19 Plaintiff was 46 years old at the alleged onset date. Tr. 318. He completed  
20 the twelfth grade in 1984 and had training as a machinist and in business  
21 management. Tr. 362. Plaintiff had a work history as an assistant manager, first

1 class mechanic, gopher, and group lead. Tr. 363. At application, he stated that he  
2 was still working, but had made changes to his work due to his conditions as of  
3 February 15, 2012. Tr. 362.

#### 4 STANDARD OF REVIEW

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

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. "The court will uphold the ALJ's  
18 conclusion when the evidence is susceptible to more than one rational  
19 interpretation." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

20 Further, a district court will not reverse an ALJ's decision on account of an error  
21 that is harmless. *Id.* An error is harmless where it is "inconsequential to the

1 [ALJ's] ultimate nondisability determination." *Id.* (quotation and citation omitted).  
2 The party appealing the ALJ's decision generally bears the burden of establishing  
3 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered "disabled" within  
6 the meaning of the Social Security Act. First, the claimant must be "unable to  
7 engage in any substantial gainful activity by reason of any medically determinable  
8 physical or mental impairment which can be expected to result in death or which  
9 has lasted or can be expected to last for a continuous period of not less than twelve  
10 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be  
11 "of such severity that he is not only unable to do his previous work[,] but cannot,  
12 considering his age, education, and work experience, engage in any other kind of  
13 substantial gainful work which exists in the national economy." 42 U.S.C. §  
14 423(d)(2)(A).

15 The Commissioner has established a five-step sequential analysis to  
16 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §  
17 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's  
18 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
19 "substantial gainful activity," the Commissioner must find that the claimant is not  
20 disabled. 20 C.F.R. § 404.1520(b).

21 If the claimant is not engaged in substantial gainful activity, the analysis

1 proceeds to step two. At this step, the Commissioner considers the severity of the  
2 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers  
3 from "any impairment or combination of impairments which significantly limits  
4 [her] physical or mental ability to do basic work activities," the analysis proceeds  
5 to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment does not  
6 satisfy this severity threshold, however, the Commissioner must find that the  
7 claimant is not disabled. 20 C.F.R. § 404.1520(c).

8 At step three, the Commissioner compares the claimant's impairment to  
9 severe impairments recognized by the Commissioner to be so severe as to preclude  
10 a person from engaging in substantial gainful activity. 20 C.F.R. §  
11 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
12 enumerated impairments, the Commissioner must find the claimant disabled and  
13 award benefits. 20 C.F.R. § 404.1520(d).

14 If the severity of the claimant's impairment does not meet or exceed the  
15 severity of the enumerated impairments, the Commissioner must pause to assess  
16 the claimant's "residual functional capacity." Residual functional capacity  
17 ("RFC"), defined generally as the claimant's ability to perform physical and  
18 mental work activities on a sustained basis despite his or her limitations, 20 C.F.R.  
19 § 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

20 At step four, the Commissioner considers whether, in view of the claimant's  
21 RFC, the claimant is capable of performing work that he or she has performed in

1 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
2 capable of performing past relevant work, the Commissioner must find that the  
3 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
4 performing such work, the analysis proceeds to step five.

5 At step five, the Commissioner considers whether, in view of the claimant's  
6 RFC, the claimant is capable of performing other work in the national economy.  
7 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
8 must also consider vocational factors such as the claimant's age, education, and  
9 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of  
10 adjusting to other work, the Commissioner must find that the claimant is not  
11 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to  
12 other work, analysis concludes with a finding that the claimant is disabled and is  
13 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

14 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
15 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
16 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
17 of performing other work; and (2) such work "exists in significant numbers in the  
18 national economy." 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,  
19 389 (9th Cir. 2012).

## 20 THE ALJ'S FINDINGS

21 Initially, the ALJ found that Plaintiff met the insured status requirements

1 under the Social Security Act through June 30, 2017. Tr. 18. At step one, the ALJ  
2 found that Plaintiff had not engaged in substantial gainful activity from the alleged  
3 onset date, February 15, 2012, through the date last insured, June 30, 2017. Tr. 18.  
4 At step two, the ALJ found that through the date last insured Plaintiff had the  
5 following severe impairments through the date last insured: degenerative disc  
6 disease; bilateral shoulder conditions; obesity; and depressive disorder. Tr. 18. At  
7 step three, the ALJ found that through the date last insured Plaintiff did not have an  
8 impairment or combination of impairments that meets or medically equals the  
9 severity of a listed impairment. Tr. 19. The ALJ then found that through the date  
10 last insured Plaintiff had the RFC to perform light work as defined in 20 CFR §  
11 404.1567(b) with the following limitations:

12 could occasionally climb ramps or stairs; occasionally crawl; frequently  
13 handle and finger; never climb ladders, ropes or scaffolds; frequently  
14 stoop, kneel, and crouch; frequently reach overhead; must avoid  
15 concentrated exposure to extreme cold, excessive vibration, and  
16 workplace hazards such as working with dangerous machinery and  
17 working at unprotected heights; if working in a seated position for  
longer than one and a half hours, would need to be able to stand and  
stretch for one to two minutes once between breaks; is limited to simple,  
routine tasks and previously well-learned detailed tasks, with no  
requirement to learn new detailed tasks, in a routine work environment.

18 Tr. 21. At step four, the ALJ found that Plaintiff had past relevant work as an  
19 assembler mechanic and was unable to perform this past relevant work through the  
20 date last insured. Tr. 25. At step five, the ALJ found that considering Plaintiff's  
21 age, education, work experience, and RFC, there were other jobs that exist in



1 significant numbers in the national economy that Plaintiff could perform through  
2 the date last insured, including positions as cleaner/housekeeper, cashier II, and  
3 marker. Tr. 26. On that basis, the ALJ concluded that Plaintiff was not under a  
4 disability, as defined in the Social Security Act, from the alleged date of onset  
5 through the date last insured. Tr. 27.

## 6 ISSUES

7 Plaintiff seeks judicial review of the Commissioner's final decision denying  
8 him DIB under Title II of the Social Security Act. ECF No. 15. Plaintiff raises the  
9 following issues for this Court's review:

- 10 1. Whether the ALJ properly addressed Plaintiff's symptom statements;
- 11 2. Whether the ALJ properly addressed the medical opinions in the file; and
- 12 3. Whether the ALJ erred in her step five determination.

## 13 DISCUSSION

### 14 1. Plaintiff's Symptom Statements

15 Plaintiff argues that the ALJ erred in evaluating his symptom testimony.  
16 ECF No. 15 at 6-10.

17 An ALJ engages in a two-step analysis to determine whether a claimant's  
18 testimony regarding subjective symptoms is reliable. *Tommasetti*, 533 F.3d at  
19 1039. First, the claimant must produce objective medical evidence of an  
20 underlying impairment or impairments that could reasonably be expected to  
21 produce some degree of the symptoms alleged. *Id.* Second, if the claimant meets

1 this threshold, and there is no affirmative evidence of malingering, “the ALJ can  
2 reject the claimant’s testimony about the severity of his symptoms only by offering  
3 specific, clear and convincing reasons for doing so.” *Id.*

4 The ALJ found that the medically determinable impairments could  
5 reasonably be expected to produce the symptoms Plaintiff alleges; however, the  
6 ALJ determined 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 prior to June 30, 2017.” Tr. 22. The  
9 ALJ supported her finding with two reasons: (1) the medical evidence is only  
10 partially consistent with the claimant’s allegations and (2) Plaintiff’s lack of  
11 treatment suggests that his symptoms were not as severe as he alleged during the  
12 relevant period. T. 22-24.

13 The ALJ’s first reason, that the medical evidence is only partially consistent  
14 with Plaintiff’s allegations, alone is not sufficient to support the ALJ’s decision.  
15 Objective medical evidence is a “relevant factor in determining the severity of the  
16 claimant’s pain and its disabling effects,” but it cannot serve as the only reason for  
17 rejecting a claimant’s credibility. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th  
18 Cir. 2001). As discussed below, the ALJ’s second reason for rejecting Plaintiff’s  
19 symptom statements was not supported by substantial evidence. Therefore,  
20 inconsistencies with the medical evidence alone is not sufficient to meet the  
21 specific, clear and convincing standard.

1 The ALJ's second reason, that Plaintiff's lack of treatment suggests his  
2 symptoms were not as severe as alleged, is not supported by substantial evidence.  
3 Noncompliance with medical care or unexplained or inadequately explained  
4 reasons for failing to seek medical treatment cast doubt on a claimant's subjective  
5 complaints. 20 C.F.R. § 404.1530; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.  
6 1989). However, a claimant cannot be denied benefits due to a lack of treatment if  
7 he cannot afford the treatment. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir.  
8 1995). The ALJ noted that Plaintiff had only five appointments for back pain  
9 control in 2015 and no further treatment prior to December 2017. Tr. 24. Plaintiff  
10 reported that he put off surgery because he was having trouble with his insurance,  
11 Tr. 66, and he failed to seek treatment between June of 2017 and December of  
12 2017 because he did not have insurance, Tr. 84. The ALJ found that "there is no  
13 mention of insurance difficulties in the treatment record," and "there is no evidence  
14 that the claimant attempted to use no or low cost clinics, or that he utilized  
15 emergency rooms." Tr. 24.

16 The ALJ's assertion that there is no mention of insurance difficulties or the  
17 use of emergency room visits in the treatment record is not supported in the record.  
18 During treatment in 2015, Plaintiff's insurance was listed as Assurant Health, Tr.  
19 498, and later as United Healthcare Community Plan of WA – Healthy Options  
20 (Medicaid HMO), Tr. 530, 533, 536, 539, 542, 546. In January of 2016, Plaintiff  
21 was seen a final time with United Healthcare Community Plan of WA – Healthy

1 Options (Medicaid HMO) listed as his insurance. Tr. 948. He then has a gap in  
2 treatment until he a trip to the emergency room at Virginia Mason Memorial on  
3 December 20, 2017, where it was reported that he had no insurance. Tr. 1001,  
4 1519. When a subsequent emergency room visit on December 26, 2017 resulted in  
5 a hospital admittance on December 27, 2017, the record demonstrates difficulties  
6 having his treatment covered. Some paperwork continues to list his insurance as  
7 the Healthy Options plan from 2015. Tr. 1061. There is a discussion of his  
8 insurance not covering transportation to the appropriate facility. Tr. 1487. He is  
9 then placed on a managed Medicaid plan. Tr. 1148. When he was placed in a  
10 rehab facility, this plan required Plaintiff to continue to use IV treatments to retain  
11 his insurance coverage. Tr. 1178. Thereafter, Plaintiff was placed on a  
12 Coordinated Care plan listed as a Medicaid Replacement plan. Tr. 1285, 1288,  
13 1291. The record demonstrates that Plaintiff was on a Medicaid plan and received  
14 treatment in 2015 and January 2016. Thereafter, he was listed as uninsured for the  
15 Emergency Room visit in early December of 2017. This is then followed by a  
16 series of changing insurances in late December of 2017 and into 2018. Therefore,  
17 the ALJ's statement that there is no evidence of insurance difficulties or using  
18 emergency rooms is not supported by the evidence and cannot be upheld. In fact,  
19 the evidence appears to support Plaintiff's assertion that he was uninsured during  
20 the treatment gap.

21 Plaintiff also discusses the ALJ's statement that Plaintiff reported he could

1 “possibly” work. ECF No. 15 at 8. However, the ALJ did not find that this  
2 statement undermined Plaintiff’s symptom statements: “He stated, however, that  
3 prior to June 30, 2017, he ‘possibly’ could have worked, but stated he had  
4 difficulty walking, could only sit for about one and a half hours at one time before  
5 needing to stretch.” Tr. 22. Therefore, the Court need to address this statement  
6 further.

7 In conclusion, the ALJ failed to provide a specific, clear and convincing  
8 reason for rejecting Plaintiff’s symptom statements. Therefore, the case is  
9 remanded for the ALJ to properly address these statements.

## 10 **2. Medical Opinions**

11 Plaintiff challenges the weight the ALJ assigned the opinions from treating  
12 providers. ECF No. 15 at 10-15.

13 There are three types of physicians: “(1) those who treat the claimant  
14 (treating physicians); (2) those who examine but do not treat the claimant  
15 (examining physicians); and (3) those who neither examine nor treat the claimant  
16 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
17 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).  
18 Generally, a treating physician’s opinion carries more weight than an examining  
19 physician’s, and an examining physician’s opinion carries more weight than a  
20 reviewing physician's. *Id.* If a treating or examining physician’s opinion is  
21 uncontradicted, the ALJ may reject it only by offering “clear and convincing

1 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
2 1211, 1216 (9th Cir. 2005). Conversely, “[i]f a treating or examining doctor's  
3 opinion is contradicted by another doctor’s opinion, an ALJ may reject it by  
4 providing specific and legitimate reasons that are supported by substantial  
5 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

6 Plaintiff presents an argument addressing the new regulation, 20 C.F.R. §  
7 404.1520c, and how the ALJ considers medical opinions. ECF No. 15 at 12.

8 However, the new regulation only applies to cases filed after March 27, 2017. 20  
9 C.F.R. § 404.1520c. Plaintiff filed this case on May 26, 2015. Tr. 109. Therefore,  
10 20 C.F.R. § 404.1520c does not apply, and Ninth Circuit caselaw is still applicable  
11 in this case.

12 Since the case is being remanded for the ALJ to properly address Plaintiff’s  
13 symptom statements, the ALJ will also readdress the medical opinions in the file in  
14 accord with Ninth Circuit caselaw and assign weight to each opinion..

### 15 **3. Step Five**

16 Plaintiff challenges the ALJ’s step five determination by arguing that the  
17 vocational expert relied on an incomplete hypothetical. ECF No. 15 at 15-17.

18 Here, the ALJ has been instructed to readdress Plaintiff’s symptom statements and  
19 the medical opinions on remand. Therefore, a new RFC determination is required,  
20 as well as a new step four and a new step five determination.

## 21 **CONCLUSION**

1 Plaintiff requests that the case be remanded for an immediate award of  
2 benefits. ECF No. 15 at 17.

3 The decision whether to remand for further proceedings or reverse and  
4 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
5 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
6 where “no useful purpose would be served by further administrative proceedings,  
7 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*  
8 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by  
9 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
10 (9th Cir. 1990); *see also Garrison v. Chater*, 759 F.3d 995, 1021 (9th Cir. 2014)  
11 (noting that a district court may abuse its discretion not to remand for benefits  
12 when all of these conditions are met). This policy is based on the “need to  
13 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
14 outstanding issues that must be resolved before a determination can be made, and it  
15 is not clear from the record that the ALJ would be required to find a claimant  
16 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
17 *Benecke*, 379 F.3d at 595-96; *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir.  
18 2000).

19 The Court finds that it is not clear from the record that the ALJ would be  
20 required to find Plaintiff disabled if all the evidence were properly evaluated.  
21 Upon remand, the ALJ will readdress Plaintiff’s symptom statement, readdress the

1 medical opinions, make a new RFC determination, make a new step four  
2 determination, and make a new step five determination. The ALJ will supplement  
3 the record with any outstanding evidence and call a vocational expert to provide  
4 testimony at any remand proceedings.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **GRANTED**,  
7 **in part**, and the matter is **REMANDED** to the Commissioner for  
8 additional proceedings.

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

10 The District Court Clerk is directed to enter this Order and provide copies to  
11 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

12 **DATED** June 27, 2022.

13 

14 \_\_\_\_\_  
LONNY R. SUKO  
Senior United States District Judge