UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

RANDY M. ROCHA, Plaintiff, -vs- CAROLYN W. COLVIN, Commissioner of Social Security,[1] Defendant.	NO. CV-12-00331-WFN ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-Motions for Summary Judgment (ECF Nos. 16 and 18). Attorney Lora Lee Stover represents Plaintiff. Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The Court has reviewed the administrative record and briefs filed by the parties and is fully informed.

JURISDICTION

Plaintiff protectively applied for supplemental security income benefits on January 25, 2010, alleging disability beginning on March 18, 1997, due to physical and mental impairments. The application was denied initially and on reconsideration.

[1] Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

A hearing was held before Administrative Law Judge (ALJ) Moira Ausems on May 16, 2011. At the hearing, Plaintiff, represented by counsel, testified as did Deborah Lapoint, a vocational expert (VE). The ALJ concluded that Plaintiff was not disabled. The Appeals Council denied Plaintiff's request for review making the ALJ's decision the final decision of the Commissioner. Pursuant to 42 U.S.C. § 405(g), this final decision is appealable to the district court. Plaintiff sought judicial review on April 30, 2012.

FACTS

The facts of the case are set forth in detail in the transcript of the proceedings and are briefly summarized here. Plaintiff was twenty two years old at the time of the hearing. Plaintiff never finished high school and has only rudimentary reading, writing, and math skills. (Tr. at 60-61.) In 2001, when he was twelve years old, Plaintiff was struck by a car and suffered a concussion and went blind in his right eye. (Tr. at 79-80.) Since the accident, Plaintiff states that he has had greater difficulty learning new things. (Tr. at 80.)

Plaintiff received childhood social security benefits. (Tr. at 56-57.) The benefits were discontinued when Plaintiff was arrested and incarcerated in November 2008. (Tr. at 58-59, 62.) In jail, Plaintiff worked in the kitchen and participated in group therapy. (Tr. at 61, 63, 78.) Plaintiff was released from jail in January 2010. (Tr. at 62.) Plaintiff has never had a job. (Tr. at 87.)

Plaintiff reports anger and anxiety issues, which are sometimes "uncontrollable." (Tr. at 67.) Plaintiff claims that his anxiety symptoms, including stomach pain and nausea, have worsened since his release from jail especially when he gets nervous or is around large groups of people. (Tr. at 68.) Plaintiff also has trouble with authority and admits that he can sometimes be violent. (Tr. at 83-84.) Plaintiff has participated in therapy from time to time and takes medication for his anger/anxiety and to treat migraines, which occur on a daily basis. (Tr. at 66, 70-71, 74.)

Plaintiff attends adult education classes three times a week for five hours a day. (Tr. at 69.) The large number of students in the classroom increases his anxiety and he prefers to study alone. (Tr. at 69.) Plaintiff spends most of his free time attempting to prepare for his classes, which mostly involves reading and writing. (Tr. at 69.) Plaintiff also states that he plays with his two daughters, goes for walks, watches movies, and plays Xbox and board games. (Tr. at 167-69.)

SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Comm'r, Soc. Sec. Admin.,* 359 F.3d 1190, 1193-94 (9th 2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

ADMINISTRATIVE DECISION

At step one, the ALJ determined that Plaintiff did not engage is substantial gainful activity since January 25, 2010, the date of application.

At step two, the ALJ found that Plaintiff had the following severe impairments: right eye blindness, status-post left femur fracture with ORIF, chronic headache disorder, borderline intellectual functioning, antisocial personality disorder, alcohol

and cannabis dependence in reported remission, and major depressive disorder with possible anxiety or mixed posttraumatic stress disorder (PTSD) symptoms. (20 C.F.R. § 416.920(c)).

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled any of the listed impairments described at 20 C.F.R. Part 404, Subpart P, Appendix 1(20 C.F.R. §§ 416.920(d), 416.925, and 416.926).

At step four, the ALJ found that Plaintiff had the residual functional capacity (RFC) to perform light work, subject to numerous physical limitations. The ALJ's RFC assessment also concluded that Plaintiff should only have superficial contact with the general public. The ALJ noted that Plaintiff had no past relevant work.

At step five, the ALJ concluded that, given Plaintiff's age, education, work experience, and RFC, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, including work as housekeeper, retail price checker, and café attendant.

STANDARD OF REVIEW

In *Edlund v. Massanari,* 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

> A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. [*Tackett*, 180 F.3d at 1097]. Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

> The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett,* 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the ALJ did not apply the proper legal standards in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to support the administrative findings, or if conflicting evidence exists that will support a finding of either disability or non-disability, the Commissioner's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ISSUES

1. Did the ALJ err in disregarding the opinions of Plaintiff's physicians regarding Plaintiff's mental impairments?

2. Did the ALJ err in assessing Plaintiff's RFC?

3. Does the record as a whole support the ALJ's conclusion that Plaintiff is not disabled?

DISCUSSION

1. Did the ALJ err in disregarding the opinions of Plaintiff's physicians regarding Plaintiff's mental impairments?

Plaintiff argues that the ALJ did not properly consider the opinions of his providers at Spokane Mental Health or the opinion of the consultative expert regarding the nature of his mental impairments. The Court disagrees.

a. Spokane Mental Health

Certain treatment records created by Spokane Mental Health support Plaintiff's argument that he suffers greater mental impairments than found by the ALJ. Along with depression and anxiety, Yookwi Im, MA and Karen Todd, MS diagnosed Plaintiff with schizophrenia and noted Plaintiff's complaints about hearing voices and hallucinating. (Tr. at 338, 356, 482, 654, 664, 684.) The ALJ gave little weight to these opinions.

The ALJ recognized that neither Yookwi Im nor Ms. Todd were acceptable medical sources. (Tr. at 36.) The Social Security Administration needs "evidence from acceptable medical sources to establish whether [a claimant] [has] a medically determinable impairment(s)." 20 C.F.R. § 416.913(a); *see also* 20 C.F.R. § 416.913(d) (therapists are "other sources," not acceptable medical sources). An ALJ is only required to give "germane" reasons to discount evidence from "other sources." *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). Germane reasons to discount evidence from "other sources" include contradictory opinions and lack of support in the record. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The ALJ provided germane reasons for giving little weight to Yookwi Im's and Ms. Todd's diagnoses. The ALJ reasoned that "the schizophrenia diagnosis . . . is not supported by the remaining evidence" and " Plaintiff's "inconsistency and non-compliance with treatment suggests that his conditions are not as troublesome as he alleges." (Tr. at 36.)

The ALJ also gave germane reasons for rejecting the opinion of Alana Brown-Clutter, MS/NCC who opined in March 2011 that Plaintiff would be unable to engage in substantial gainful activity for 12 months. (Tr. at 493.) The ALJ rejected this opinion because it was "countered by the majority of the remaining evidence." (Tr. at 36.) This was a germane reason for rejecting Ms. Brown-Clutter's opinion. *See Batson*, 359 F.3d at 1195 (An ALJ may reject medical opinions that are "conclusory, brief, and unsupported by the record as a whole.").

The ALJ briefly cited to a record signed by Spokane Mental Health physician Hal Gillespie, M.D. noting that Dr. Gillespie diagnosed Plaintiff with generalized anxiety disorder. (Tr. at 31.) It is true that Dr. Gillespie diagnosed Plaintiff with Major Depression (moderate), Generalized Anxiety Disorder (severe), and Borderline Personality Disorder (with paranoid traits). (Tr. at 382.) But Dr. Gillespie also found Plaintiff that was "oriented in all spheres, memory is intact and intelligence is normal." (Tr. at 382.) Dr. Gillespie also observed that Plaintiff's speech was "coherent, relevant and goal directed without over psychotic thought content." (Tr. at 382.) Although the ALJ did not discuss Dr. Gillespie's opinions in detail, she was not required to. "[I]n interpreting the evidence and developing the record, the ALJ does not need to discuss every piece of evidence." *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (internal quotation marks omitted). Dr. Gillespie's opinions do not contradict the other medical evidence in the record or the ALJ's ultimate finding of nondisability. Any error associated with the ALJ's failure to discuss Dr. Gillespie's opinion in greater detail was harmless because the opinions were "inconsequential to the ultimate nondisability determination." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008).

The ALJ properly evaluated the records created by Spokane Mental Health.

b. Consultative expert: Nathan D. Henry, Psy. D.

Plaintiff argues that the ALJ improperly rejected the opinion of the "consultative expert." (ECF No. 16 at 10.) Plaintiff fails to identify the opinion in question but the Court assumes that Plaintiff is referencing the opinion of Nathan D. Henry, Psy. D. who conducted an independent psychological evaluation of Plaintiff in May 2010.[2] The

[2]Defendant suggests that Plaintiff might have also meant Eric S. Hussey, O.D. as the "consultative expert." (ECF No. 18 at 9.) Given that Plaintiff is only challenging the ALJ's consideration of the consultative expert's opinions "as they pertain to Plaintiff's mental

Court disagrees that the ALJ improperly rejected Dr. Henry's opinions. Plaintiff's argument is flawed because the ALJ did not actually reject Dr. Henry's opinion. Rather, the ALJ assigned "significant weight [to Dr. Henry's opinion] as it is consistent with the overall evidence and the opinions of other accepted medical sources." (Tr. at 35.) Dr. Henry's opinion does not support Plaintiff's argument that he has greater mental limitations than determined by the ALJ. Dr. Henry noted that Plaintiff complained of hearing voices and experiencing hallucinations. (Tr. at 281.) After performing psychiatric tests, however, Dr. Henry concluded that Plaintiff had "no cognitive impairment." (Tr. at 284.) Dr. Henry also observed that Plaintiff had no difficulty in "managing money" (Tr. at 284) and that Plaintiff "demonstrated adequate focus, concentration and memory during . . . evaluation." (Tr. at 285-86.) The ALJ did not err in giving significant weight to Dr. Henry's opinions

Plaintiff fails to show that the ALJ erred in evaluating the medical evidence regarding his mental impairments. The ALJ properly accorded significant weight to the acceptable medical opinion of Dr. Henry. The ALJ also did not err in failing to discuss Dr. Gillespie's opinions in detail. Finally, the ALJ gave germane reasons for rejecting the opinions of Plaintiff's therapists at Spokane Mental Health.

2. Did the ALJ err in assessing Plaintiff's RFC?

A claimant's RFC is "the most [a claimant] can still do despite [his] limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(c) (defining RFC as the "maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs."). In formulating an RFC, the ALJ weighs medical and other source opinion and also considers the claimant's

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conditions" (ECF No. 16 at 10), however, the Court concludes that Plaintiff is not challenging the ALJ's consideration of Dr. Hussey's opinions.

credibility and ability to perform daily activities. *See*, *e.g.*, *Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

In this case, the ALJ found that Plaintiff had the RFC to

> perform light work . . . except he is unable to perform work requiring binocular vision or even moderate exposure to hazards; he is limited to occasional balancing, stooping, kneeling, crouching, crawling, and climbing ramps or stairs, but can never climb ladders, ropes, or scaffolds; and he can perform simple, routine tasks that do not involve more than superficial contact with the general public.

(Tr. at 33.)

The ALJ's RFC determination is consistent with the medical evidence in this case. As discussed above, neither the records from Spokane Mental Health nor Dr. Henry's opinions support a finding that Plaintiff suffers from greater mental impairments than those assessed by the ALJ. Furthermore, Edward Beaty, Ph.D., a psychological evaluator at the state level of disability determination, opined that Plaintiff's medical record did not fully support Plaintiff's allegations and concluded that Plaintiff was capable of simple work with superficial contact with the public. (Tr. at 313.) In completing a mental RFC assessment, Dr. Beaty noted that, in a majority of functioning areas, Plaintiff's mental impairments were "not significantly limited." (Tr. at 315-16.) Dr. Beaty concluded that Plaintiff was capable of "simple, multi-step, repetitive tasks, "superficial work-related social interactions," and "manag[ing] simple variations in his work-related routine, avoid[ing] hazards, travel[ing] to and from work-like settings and carry[ing] out work-related goals and plans set by others." (Tr. at 317.)

The ALJ's RFC is determination is also consistent with Plaintiff's own reported ability to perform daily activities. At the hearing, Plaintiff stated that the only household chore he was able to help with was "wip[ing] . . . down" the kitchen. (Tr. at 73.) This statement is belied by other reports made by Plaintiff in which he reported that he was capable of taking part in family activities such as playing with his children and going on walks (Tr. at 169-70),

helping with household chores such as taking out the garbage, washing dishes, vacuuming, household repairs, and mowing lawn (Tr. at 168-69), making simple meals (Tr. at 168), walking to the store (Tr. at 169), and watching movies, playing Xbox, and board games (Tr. at 170). Plaintiff also stated that, even though it was difficult for him, he spent most of his free time attempting to read and write in preparation for his classes. (Tr. at 69.) To the extent that there was conflicting evidence about Plaintiff's abilities to perform daily activities, the ALJ reasonably resolved the ambiguities. *Richardson*, 402 U.S. at 400.

Plaintiff further argues that the ALJ's RFC determination is inconsistent with the ALJ's paragraph B criteria analysis at step three where the ALJ found that Plaintiff had moderate social functioning difficulties and moderate to marked difficulties relating to concentration, persistence, or pace. (Tr. at 32.) The Court disagrees that the ALJ's paragraph B criteria analysis is inconsistent with the ALJ's RFC determination. In analyzing both the paragraph B criteria and Plaintiff's RFC, the ALJ reached essentially the same conclusion: although Plaintiff has certain mental limitations, these limitations do not preclude him from working under certain conditions. The Plaintiff fails to show that the ALJ erred in either analyzing the paragraph B criteria or in determining Plaintiff's RFC.

Finally, Plaintiff argues that the ALJ should have accepted the VE's answer to the ALJ's second hypothetical question. After posing a first hypothetical question to the VE, the ALJ followed up by asking whether an individual with Plaintiff's limitations could perform competitive employment when the individual would also require "special supervision" to help him "set goals, make adjustments to routine changes, and . . . to deal[] with distractions from psychological symptoms such as anger and anxiety." (Tr. at 90.) The VE answered that no work would be available for such an individual. (Tr. at 90.) A hypothetical question is proper if it is based on "medical assumptions supported by substantial evidence in the record that reflects each of the claimant's limitations." *Osenbrock v. Apfel*, 240 F.3d 1157, 1163 (9th Cir. 2001). When an ALJ poses two hypothetical questions, adding additional limitations in

the second hypothetical, the ALJ is not necessarily "bound to accept as true the restrictions set forth in the second hypothetical question if they were not supported by substantial evidence." *Id.* at 1164-65. Substantial evidence does not support the alleged fact that Plaintiff requires "special supervision." To the contrary, Dr. Beaty opined that Plaintiff's "ability to sustain an ordinary routine without special supervision" was "not significantly limited." (Tr. at 315.) Plaintiff fails to show that the ALJ erred by not relying on the second hypothetical because substantial evidence does not support the conclusion that Plaintiff requires special supervision.

The ALJ did not err in assessing Plaintiff's RFC.

3. Does the record as a whole support the ALJ's conclusion that Plaintiff is not disabled?

Substantial evidence supports the ALJ's conclusion that Plaintiff's mental impairments do not render him disabled. As discussed above, Plaintiff's examining physicians, including Dr. Henry, Dr. Beaty, and Dr. Gillespie, all acknowledge that Plaintiff suffers from certain mental impairments, including depression and anxiety. None of Plaintiff's physicians, however, opined that Plaintiff's mental impairments were severe enough to preclude him from working. Plaintiff's ability to carry out daily activities further undermines his argument that he is disabled. The Court "must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record . . . [e]ven when the evidence is susceptible to more than one rational interpretation." *Molina*, 674 F.3d at 1111. Plaintiff fails to prove that the ALJ's findings are not supported by inferences reasonably drawn from the record. The Court finds the record as a whole supports the ALJ's conclusion that Plaintiff is not disabled.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is supported by substantial evidence and is not based on legal error. Accordingly,

IT IS ORDERED that:

1. Defendant's Motion for Summary Judgment, filed April 4, 2013, **ECF No. 18**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, filed February 25, 2013, **ECF No. 16**, is **DENIED**.

The District Court Executive is directed to file this Order and provide copies to counsel. Judgment shall be entered for Defendant and the file shall be **CLOSED.**

DATED this 15th day of October, 2013.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE

10-10-13