

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

Aug 25, 2017

SEAN F. MCAVOY, CLERK

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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON
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10 JACK R. WHEELER,

11 Plaintiff,

12 v.
13

14 COMMISSIONER OF SOCIAL
15 SECURITY,

16 Defendant.
17

No. 2:16-CV-00171-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

18 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
19 No. 16, 17. Attorney Lora Lee Stover represents Jack R. Wheeler (Plaintiff);
20 Special Assistant United States Attorney Jeffrey E. Staples represents the
21 Commissioner of Social Security (Defendant). The parties have consented to
22 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
23 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
24 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

25 **JURISDICTION**

26 Plaintiff filed an application for Supplemental Security Income (SSI) on
27 June 8, 2012, Tr. 267, alleging disability since July 1, 1991, Tr. 223-229, due to an
28 L1 compression fracture, depression, three crushed discs in his back, carpal tunnel

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 in his right wrist, a broken right toe, a torn meniscus in the right knee, a broken
2 ankle, pins in his wrist, anxiety, a broken leg, and a broken shoulder that did not
3 heal properly. Tr. 271. The application was denied initially and upon
4 reconsideration. Tr. 147-150, 154-156. Administrative Law Judge (ALJ) Donna
5 L. Walker held a hearing on October 2, 2014 and took testimony from Plaintiff,
6 vocational expert, Daniel McKinney, and medical expert, Anthony Francis, M.D.
7 Tr. 57-87. At the hearing, Plaintiff amended his alleged date of onset to the date of
8 application, June 8, 2012. Tr. 59. The ALJ issued an unfavorable decision on
9 November 3, 2014. Tr. 31-43. The Appeals Council denied review on March 29,
10 2016. Tr. 1-7. The ALJ's November 3, 2014 decision became the final decision of
11 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
12 405(g). Plaintiff filed this action for judicial review on May 25, 2016. ECF No. 1,
13 4.

14 **STATEMENT OF FACTS**

15 The facts of the case are set forth in the administrative hearing transcript, the
16 ALJ's decision, and the briefs of the parties. They are only briefly summarized
17 here.

18 Plaintiff was 44 years old at the date of application. Tr. 223. Plaintiff
19 received his GED in 1986 and attended some community college ending in 2005.
20 Tr. 272. He reported his work history as a greenhouse worker, laborer, and
21 landscape foreman. *Id.* Plaintiff reported that he stopped working on July 1, 2005
22 due to his conditions. Tr. 271.

23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
26 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
27 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
28 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

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

15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
18 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
19 proof rests upon the claimant to establish a prima facie case of entitlement to
20 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the
21 claimant establishes that physical or mental impairments prevent him from
22 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
23 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
25 other work, and (2) specific jobs exist in the national economy which the claimant
26 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
27 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
28 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

1 Tr. 36. The ALJ found Plaintiff had no past relevant work as defined by the
2 regulations. Tr. 41.

3 At step five, the ALJ determined that, considering Plaintiff's age, education,
4 work experience, residual functional capacity, and the testimony of the vocational
5 expert, there were other jobs that exist in significant numbers in the national
6 economy Plaintiff could perform, including the jobs of checker II, automatic
7 packer-operator, and inspector packer. Tr. 42. The ALJ concluded Plaintiff was
8 not under a disability within the meaning of the Social Security Act at any time
9 from the date of application, June 8, 2012, through the date of the ALJ's decision,
10 November 3, 2014. Tr. 42.

11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's
13 decision denying benefits and, if so, whether that decision is based on proper legal
14 standards. Plaintiff contends that the ALJ erred by (1) failing to properly assess
15 Plaintiff's symptom statements; (2) failing to properly assess Plaintiff's residual
16 functional capacity, and (3) finding Plaintiff capable of substantial gainful activity
17 at step five. ECF No. 16 at 9-10.

18 DISCUSSION

19 A. Plaintiff's Symptom Statements

20 Plaintiff contests the ALJ's evaluation of his symptom statements. ECF No.
21 16 at 12-13.

22 It is generally the province of the ALJ to make determinations regarding the
23 credibility of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
24 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
25 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
26 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
27 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
28 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:

1 rather the ALJ must identify what testimony is not credible and what evidence
2 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

3 The ALJ found Plaintiff less than fully credible concerning the intensity,
4 persistence, and limiting effects of his symptoms. Tr. 37, 39. The ALJ reasoned
5 that Plaintiff was less than fully credible because (1) his testimony and allegations
6 were inconsistent with objective medical evidence, (2) he made inconsistent
7 statements regarding his abilities, and (3) his allegations were inconsistent with his
8 reported activities of daily living. Tr. 39.

9 Plaintiff failed to challenge any of the ALJ's reasons with specificity. *See*
10 ECF No. 16 at 12-13. Instead, Plaintiff asserted that his pain complaints should
11 not have been rejected. *Id.* Because Plaintiff failed to challenge the ALJ's
12 rationale, the Court will not consider the issue of credibility. *See Carmickle v.*
13 *Comm'r, Soc. Sec.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth Circuit
14 explained the necessity for providing specific argument:

15 The art of advocacy is not one of mystery. Our adversarial system relies
16 on the advocates to inform the discussion and raise the issues to the
17 court. Particularly on appeal, we have held firm against considering
18 arguments that are not briefed. But the term "brief" in the appellate
19 context does not mean opaque nor is it an exercise in issue spotting.
20 However much we may importune lawyers to be brief and to get to the
21 point, we have never suggested that they skip the substance of their
22 argument in order to do so. It is no accident that the Federal Rules of
23 Appellate Procedure require the opening brief to contain the
24 "appellant's contentions and the reasons for them, with citations to the
authorities and parts of the record on which the appellant relies." Fed.
R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
reasons.

25 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).¹

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27 ¹Under the current version of the Federal Rules of Appellate Procedure, the
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
2 “manufacture arguments for an appellant” and therefore will not consider claims
3 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*
4 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).

5 **B. Residual Functional Capacity**

6 Plaintiff argues the ALJ erred in her formation of the residual functional
7 capacity determination. ECF No. 16 at 13-15. Specially, Plaintiff asserts that the
8 ALJ ignored limitations regarding his pain and his ability to stand and/or walk for
9 extended periods, that the ALJ did not take Dr. Francis’s full opinion into
10 consideration, and that the ALJ failed to include all the limitations opined by Dr.
11 Bailey. *Id.*

12 A claimant’s residual functional capacity is “the most [a claimant] can still
13 do despite [his] limitations.” 20 C.F.R. § 416.945(a). In formulating a residual
14 functional capacity, the ALJ weighs medical and other source opinions and also
15 considers the claimant’s credibility and ability to perform daily activities. *See,*
16 *e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

17 **1. Additional Limitations**

18 Plaintiff asserts the existence of additional limitations resulting from pain
19 and additional limitations in his ability to stand and/or walk for extended periods.
20 ECF No. 16 at 13-14. However, Plaintiff failed to state what these limitations were
21 with any specificity or assert how the medical record supported their existence. As
22 such, the Court is unable to consider whether or not undefined limitations are
23 supported by substantial evidence.

24 **2. Anthony Francis, M.D.**

25 Plaintiff asserts that Dr. Francis opined that if pain testimony regarding were
26 accepted as credible, he would be limited to light work. ECF No. 16 at 14.

27 At the October 2, 2014 hearing, Dr. Francis was asked whether a medium or
28 light residual functional capacity was more appropriate in this case. Tr. 65. He

1 responded with “Well just based on the pathology that’s present and following
2 Social Security rules a medium [residual functional capacity] would be
3 appropriate. If there are other facts such as chronic pain or testimony, that type of
4 thing that it could be reasonably be reduced down to a light [residual functional
5 capacity] with the same limitations.” *Id.* Dr. Francis was asked if the limitation to
6 light work was “Assuming credibility?” to which he answered, “Yes.” *Id.*

7 In his decision, the ALJ characterized Dr. Francis’s opinion as limiting
8 Plaintiff to “a medium to light work level, . . .” Tr. 39. The ALJ then gave his
9 opinion “significant weight.” *Id.*

10 Here, Plaintiff’s assertions that his pain testimony should be afforded
11 significant weight were not sufficient to be addressed in detail by this Court. *See*
12 *supra*. As such, the Court refused to disturb the ALJ’s credibility determination.
13 Seeing that Dr. Francis’s limitation to light work required credible pain testimony
14 as a precursor, the Court finds that the ALJ’s reliance on Dr. Francis’s medium to
15 light work limitation is without error.

16 **3. James Bailey, Ph.D.**

17 Plaintiff asserts that the ALJ failed to include all the limitations opined by
18 Dr. Bailey in the residual functional capacity. ECF No. 16 at 14-15.

19 On January 4, 2013, Dr. Bailey reviewed Plaintiff’s file and completed a
20 Mental Residual Functional Capacity Assessment (MRFCA). Tr. 135-137. As to
21 Plaintiff’s sustained concentration and persistence limitations, he gave Plaintiff a
22 moderate² limitation in the abilities to maintain attention and concentration for
23 extended periods, to perform activities within a schedule, maintain regular
24 attendance, and be punctual within customary tolerances, to complete a normal
25 workday and workweek without interruptions form psychologically based

26
27 ²The term moderate is undefined throughout Dr. Bailey’s opinion. Tr.135-
28 137.

1 symptoms, and to perform at a consistent pace without an unreasonable number
2 and length of rest periods. Tr. 136. In the narrative section of the form, he stated,
3 “[w]hen sober, [claimant] is capable of at least [simple repetitive tasks and] likely
4 some [complex detailed tasks, especially] those well learned. Sustained
5 [concentration, persistence and pace and] attendance will vary [due to
6 psychological symptoms] and subjective somatic complaints. Nonetheless [he is]
7 capable of productive work [within] physical limitations.” *Id.* As to Plaintiff’s
8 social interaction limitations, Dr. Bailey gave him a moderate limitation in the
9 ability to interact appropriately with the general public. *Id.* In the narrative
10 section, Dr. Bailey stated “[b]est [with] superficial social interactions in the
11 workplace.” Tr. 137. As to Plaintiff’s adaptation limitations, Dr. Bailey gave him
12 a moderate limitation in the ability to respond appropriately to changes in the work
13 setting. *Id.* In the narrative section, Dr. Bailey stated “[c]apable of appropriate
14 response to simple straightforward changes in the workplace. [Symptoms] may
15 interfere [with] his ability to always respond approp[r]iately to changes he
16 perceives as personally negative. Able to avoid [normal] hazards, travel, and
17 coop[er]ate with] plans made by self [and] others.” *Id.* The ALJ gave Dr. Bailey’s
18 opinion “significant weight.” Tr. 38.

19 Plaintiff argues that the ALJ failed to include the moderate limitations in the
20 residual functional capacity determination. ECF No. 16 at 14. However, the
21 Program Operations Manual System³ (POMS) DI 24510.060 details Social

23 ³The POMS does not impose judicially enforceable duties on the Court or
24 the ALJ, but it may be “entitled to respect” under *Skidmore v. Swift & Co.*, 323
25 U.S. 134 (1944), to the extent it provides a persuasive interpretation of an
26 ambiguous regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587-588,
27 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Lockwood v. Comm’r Soc. Sec. Admin.*,
28 616 F.3d 1068, 1073 (9th Cir. 2010). Here, the issue is not determining the

1 Security’s Operating Policy as to the MRFCA forms complete by psychological
2 consultants and directs that the moderate limitations provided by Dr. Bailey do not
3 constitute his opinion. While the provision speaks specifically to Form SSA-4734-
4 F4-SUP, the Court finds that the premise of how a MRFCA provided by the
5 agency is to be read can be extrapolated from this provision. Accordingly, the
6 section of the form that includes mental function items with limitations ranging
7 from “not significantly limited” to “markedly limited,” “is merely a worksheet to
8 aid in deciding the presence and degree of functional limitations and the adequacy
9 of documentation and does not constitute the [residual functional capacity]
10 assessment.” POMS DI 24510.060. Instead, the actual residual functional
11 capacity assessment is recorded in the narrative provided on the form, explaining
12 the conclusions indicated in the moderate limitations expressed above the
13 narrative. *Id.* Therefore, the opined residual functional capacity assessment was
14 not the moderate limitations given by Dr. Bailey, but the narrative sections.

15 Because the relevant opinion was contained in the narrative section, Dr.
16 Bailey’s opinion is adequately addressed in the ALJ’s residual functional capacity
17 determination.

18 **C. Step Five**

19 Plaintiff argues that the ALJ erred in finding him capable of substantial
20 gainful activity at step five. ECF No. 16 at 10. Plaintiff premised this argument on
21 the assertion that the ALJ failed to include all his limitations in the residual

22 _____
23 meaning of an ambiguous regulation, but instead understanding how to correctly
24 read a form produced and distributed by the Social Security Administration to its
25 medical consultants. Therefore, by relying on the POMS provision in this case, the
26 Court is not allowing the provision to set a judicially enforceable duty on the ALJ,
27 but only using it as a guide to define the parameters of a medical consultant’s
28 opinion on an agency supplied form.

1 functional capacity determination. *Id.* at 15. However, since this Court has found
2 that there was no error in the ALJ's residual functional capacity determination,
3 there is no resulting error in step five.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, the Court finds the
6 ALJ's decision is supported by substantial evidence and free of harmful legal error.
7 Accordingly, **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED.**

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

14 **IT IS SO ORDERED.**

15 DATED August 25, 2017.



A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE