

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

Aug 14, 2017

SEAN F. MCAVOY, CLERK

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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 ADAM D. PYLE,

10 Plaintiff,

11 v.

12
13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.
16

No. 2:16-CV-00172-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
18 No. 18, 20. Attorney Dana C. Madsen represents Adam D. Pyle (Plaintiff); Special
19 Assistant United States Attorney Daniel P. Talbert represents the Commissioner of
20 Social Security (Defendant). The parties have consented to proceed before a
21 magistrate judge. ECF No. 6. After reviewing the administrative record and briefs
22 filed by the parties, the Court **GRANTS** Defendant's Motion for Summary
23 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

24 **JURISDICTION**

25 Plaintiff received Supplemental Security Income (SSI) benefits as a child.
26 Tr. 30. Upon turning 18, his case was reviewed and it was deemed that he met the
27 definition of disability for adults. Tr. 30, 47. On September 19, 2011, a review of
28 the case found that his disability ceased as of September 1, 2011. Tr. 31, 47.

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 Plaintiff requested reconsideration of the cessation, Tr. 50, and the cessation was
2 affirmed, Tr. 51. On February 2, 2012, Plaintiff attended a hearing with a
3 Disability Hearing Officer. Tr. 54. The Hearing Officer determined that cessation
4 of benefits was appropriate, but the correct cessation date was April 1, 2012. Tr.
5 64. Plaintiff requested a hearing by an Administrative Law Judge (ALJ). Tr. 65.
6 On February 6, 2013, ALJ Lori Freund held a hearing and continued the matter to
7 allow Plaintiff time to hire an attorney. Tr. 811-827. A second hearing was held
8 on August 21, 2013, and the ALJ heard testimony from Plaintiff and vocational
9 expert, K. Diane Kramer. Tr. 828-870. The ALJ issued an unfavorable decision
10 on April 21, 2014. Tr. 15-28. The Appeals Council denied review on March 31,
11 2016. Tr. 1-7. The ALJ's April 21, 2014 decision became the final decision of the
12 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
13 405(g). Plaintiff filed this action for judicial review on May 26, 2016. ECF No. 1,
14 4.

15 **STATEMENT OF FACTS**

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

19 Plaintiff was 19 years old at the date of cessation, April 1, 2012. Tr. 32.
20 Plaintiff has an eleventh grade education followed by a GED. Tr. 610. He
21 received services from Division of Vocational Rehabilitation but has no work
22 history. Tr. 611-612. His alleged impairments include Asperger's syndrome,
23 schizo-affective disorder, Ehlers-Danlos Syndrome (EDS), anxiety, irritable bowel
24 syndrome (IBS), and a sun allergy. Tr. 210, 228, 855-859.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
11 findings, or if conflicting evidence supports a finding of either disability or non-
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
13 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
14 substantial evidence will still be set aside if the proper legal standards were not
15 applied in weighing the evidence and making the decision. *Brawner v. Secretary*
16 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 SEQUENTIAL EVALUATION PROCESS

18 The Commissioner has established an eight-step sequential evaluation
19 process for determining whether a person's disability has ended. 20 C.F.R. §
20 416.994(b)(5). This process is similar to the five-step sequential evaluation
21 process used to evaluate initial claims, with additional attention as to whether there
22 has been medical improvement. Compare 20 C.F.R. § 416.920 with 20 C.F.R. §
23 416.994(b)(5). A claimant is disabled only if his impairment is "of such severity
24 that he is not only unable to do his previous work[,] but cannot, considering his
25 age, education, and work experience, engage in any other kind of substantial
26 gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

27 The first step addresses whether the claimant has an impairment or
28 combination of impairments that meet or equal the severity of listed impairments

1 set forth at 20 C.F.R. pt. 404, subpt. P, app. 1. 20 C.F.R. § 416.994(b)(5)(i). If the
2 impairment does not equal a listed impairment, the second step addresses whether
3 there has been medical improvement in the claimant’s condition. 20 C.F.R. §
4 416.994(b)(5)(ii). Medical improvement is “any decrease in the medical severity”
5 of the impairment that was present at the time the individual was disabled or
6 continued to be disabled. 20 C.F.R. § 416.994(b)(1)(i). If there has been medical
7 improvement, a step three determination is made addressing whether such
8 improvement is related to the claimant’s ability to perform work—that is, whether
9 there has been an increase in the individual’s residual functional capacity. 20
10 C.F.R. § 416.994(b)(5)(iii).

11 If the answer to step three is yes, the Commissioner skips to step five and
12 inquires whether all of the claimant’s current impairments in combination are
13 severe. At step five, if medical improvement is shown to be related to the
14 claimant’s ability to work, a determination will be made to assess whether the
15 claimant’s current impairments, in combination, are severe—that is, whether they
16 impose more than a minimal limitation on his physical or mental ability to perform
17 basic work activities. 20 C.F.R. § 416.994(b)(5)(v). If the answer to that inquiry is
18 yes, the claim proceeds to step six and the ALJ must determine whether the
19 claimant can perform past relevant work. 20 C.F.R. § 416.994(b)(5)(vi). If the
20 claimant can perform past relevant work, his disability will be deemed to have
21 ended. *Id.* If the claimant cannot perform his past relevant work, at step seven a
22 limited burden of production shifts to the Commissioner to prove there is
23 alternative work in the national economy that the claimant can perform given his
24 age, education, work experience, and residual functional capacity. 20 C.F.R. §
25 416.994(b)(5)(vii). Similarly, if the claimant has no past relevant work, step eight
26 mimics step seven in considering his ability to perform other work in the national
27 economy. 20 C.F.R. § 416.994(b)(5)(viii). If the claimant cannot perform a
28 significant number of other jobs, he remains disabled despite medical

1 improvement; if, however, he can perform a significant number of other jobs,
2 disability ceases. 20 C.F.R. § 416.994(b)(5)(vii)-(viii).

3 Alternatively, if the answers to steps two or three is no, the evaluation
4 proceeds to step four. At step four, consideration is given to whether the case
5 meets any of the special exceptions to medical improvement for determining that
6 disability has ceased. 20 C.F.R. § 416.994(b)(5)(iv). If no special exception
7 applies, the claimant's disability will be found to continue.

8 While the claimant bears the burden of proving disability, *Tackett*, 180 F.3d
9 at 1098-1099, once a claimant has been found disabled, a presumption of
10 continuing disability arises in his favor. *Bellamy v. Sec. of Health & Human Serv.*,
11 755 F.2d 1380, 1381 (9th Cir. 1985). The Commissioner bears the burden of
12 producing evidence sufficient to rebut this presumption. *Id.*

13 ADMINISTRATIVE DECISION

14 On April 21, 2014, the ALJ issued a decision finding Plaintiff's disability
15 under section 1614(a)(3)(A) of the Social Security Act ended on April 1, 2012 and
16 that Plaintiff had not been disabled again since that date. Tr. 28.

17 The ALJ identified the most recent favorable medical decision in the case to
18 be November 15, 2010 and deemed it the point of comparison. In that
19 determination, Plaintiff had the medically determinable impairments of EDS and
20 Asperger's disorder and was found to meet section 11.04B of 20 C.F.R. Part 404,
21 Subpart P, Appendix 1. Tr. 17.

22 The ALJ then found that as of April 1, 2012, Plaintiff had the following
23 medically determinable impairments: hypermobility syndrome; IBS; somatization
24 disorder; attention deficit hyperactivity disorder (ADHD); anxiety disorder, not
25 otherwise specified; and personality disorder with schizoid and dependent features.
26 Tr. 17.

27 At step one, the ALJ found that Plaintiff did not have an impairment or
28 combination of impairments which met or medically equaled the severity of an

1 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 17.

2 At step two, the ALJ determined that medical improvement had occurred as
3 of April 1, 2012. Tr. 19.

4 At step three, the ALJ found the medical improvement was related to the
5 ability to work, because as of April 1, 2012, the impairments present at Plaintiff's
6 point of comparison, EDS and Asperger's Syndrome, no longer met or medically
7 equaled the same listing. Tr. 19.

8 A step four determination was not necessary, as medical improvement was
9 found at step two and the medical improvement was found to be related to the
10 ability to work at step three.

11 At step five, the ALJ found that as of April 1, 2012, Plaintiff continued to
12 have a severe impairment or combination of impairments. Tr. 19.

13 At step six, the ALJ found that as of April 1, 2012, Plaintiff had a residual
14 functional capacity to perform work at all exertional levels with the following
15 nonexertional limitations:

16 The claimant can occasionally climb ladders, rope[s], and scaffolds. He
17 should avoid exposure to hazardous machinery and unprotected heights
18 and operational control of moving machinery. The claimant is limited
19 to simple, routine, and repetitive tasks. He should work away from the
20 general public and he can have superficial interaction with a small
21 number of coworkers. He cannot perform tandem tasks. He can work
22 in a low stress environment with only occasional decision-making and
occasional changes in the work setting.

23 Tr. 19-20. The ALJ found Plaintiff had no past relevant work, resulting in step seven
24 being skipped. Tr. 26.

25 At step eight, the ALJ determined that, considering Plaintiff's age,
26 education, work experience and residual functional capacity, and based on the
27 testimony of the vocational expert, there were jobs that exist in significant numbers
28 in the national economy Plaintiff could perform, including the jobs of laundry

1 worker II, dishwasher, and industrial cleaner. Tr. 27. The ALJ concluded
2 Plaintiff's disability ended as of April 1, 2012 and he had not become disabled
3 again since that date. Tr. 27-28.

4 **ISSUES**

5 The question presented is whether substantial evidence supports the ALJ's
6 decision ending benefits and, if so, whether that decision is based on proper legal
7 standards. Plaintiff contends the ALJ erred by failing to properly weigh the
8 medical opinions in the file.

9 **DISCUSSION**

10 Plaintiff challenges the weight the ALJ assigned to Beth Fitterer, Ph.D.,
11 Dennis R. Pollack, Ph.D., Allen D. Bostwick, Ph.D., John T. Jaccard, M.D., and
12 Norman Staley, M.D. ECF No. 18 at 13-20.

13 In weighing medical source opinions, the ALJ should distinguish between
14 three different types of physicians: (1) treating physicians, who actually treat the
15 claimant; (2) examining physicians, who examine but do not treat the claimant;
16 and, (3) nonexamining physicians who neither treat nor examine the claimant.
17 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
18 weight to the opinion of a treating physician than to the opinion of an examining
19 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
20 should give more weight to the opinion of an examining physician than to the
21 opinion of a nonexamining physician. *Id.*

22 When a treating physician's opinion is not contradicted by another
23 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
24 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
25 physician's opinion is contradicted by another physician, the ALJ is only required
26 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
27 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
28 physician's opinion is not contradicted by another physician, the ALJ may reject

1 the opinion only for “clear and convincing” reasons, and when an examining
2 physician’s opinion is contradicted by another physician, the ALJ is only required
3 to provide “specific and legitimate reasons.” *Lester*, 81 F.3d at 830-831.

4 The specific and legitimate standard can be met by the ALJ setting out a
5 detailed and thorough summary of the facts and conflicting clinical evidence,
6 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
7 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
8 conclusions, she “must set forth [her] interpretations and explain why they, rather
9 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
10 1988).

11 **1. Beth Fitterer, Ph.D.**

12 On September 19, 2011, Dr. Fitterer, a state agency reviewer, reviewed
13 Plaintiff’s medical records and completed a Psychiatric Review Technique
14 Assessment and a Mental Residual Functional Capacity Assessment (MRFCA).
15 Tr. 456-462. Dr. Fitterer opined that Plaintiff did not have an impairment that met
16 or medically equaled a listing. Tr. 456-458. On the MRFCA, she stated that
17 Plaintiff was moderately limited in the ability to perform activities within a
18 schedule, maintain regular attendance, and be punctual within customary
19 tolerances, the ability to work in coordination with or in proximity to others
20 without being distracted by them, and the ability to interact appropriately with the
21 general public. Tr. 459-461. In the narrative sections of the MRFCA, she stated
22 that “[d]espite consistent reporting of anxiety and ADHD, [claimant] is capable of
23 performing complex tasks without significant interference of [concentration,
24 persistence, and pace],” and that “[medical] reports social skills remain impaired.
25 However, [claimant] is capable of superficial social interactions at school and with
26 medical providers. He would be capable of interacting appropriately with others in
27 the workplace.” Tr. 461-462. In her decision, the ALJ gave Dr. Fitterer’s opinion
28 significant weight, summarizing the opinion as “[s]he said the claimant is capable

1 of complex tasks without significant interference from concentration, persistence,
2 and pace and [s]he is capable of superficial social interactions.” Tr. 24.

3 Plaintiff challenged the ALJ’s treatment of the opinion, asserting that the
4 ALJ failed to address all of the opinion and any portion of the opinion not
5 explicitly rejected by the ALJ should have been included in the residual functional
6 capacity determination. ECF No. 18 at 14. Plaintiff also argued that the ability to
7 perform complex tasks was inconsistent with Dr. Fitterer’s statement that Plaintiff
8 would have difficulty with attention, concentration, scheduling, attendance, and
9 tardiness.

10 However, the Program Operations Manual System¹ (POMS) DI 24510.060
11 details Social Security’s Operating Policy as to the MRFCAs complete by
12 psychological consultants and directs that the moderate limitations provided by Dr.
13 Fitterer do not constitute her opinion. While the provision speaks specifically to
14 Form SSA-4734-F4-SUP, the Court finds that the premise of how a MRFCAs
15 provided by the agency is to be read can be extrapolated from this provision.

16 _____
17 ¹The POMS does not impose judicially enforceable duties on the Court or
18 the ALJ, but it may be “entitled to respect” under *Skidmore v. Swift & Co.*, 323
19 U.S. 134 (1944), to the extent it provides a persuasive interpretation of an
20 ambiguous regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587-588,
21 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Lockwood v. Comm’r Soc. Sec. Admin.*,
22 616 F.3d 1068, 1073 (9th Cir. 2010). Here, the issue is not determining the
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 Accordingly, the section of the MRFCA form that includes mental function items
2 with limitations ranging from “not significantly limited” to “markedly limited,” “is
3 merely a worksheet to aid in deciding the presence and degree of functional
4 limitations and the adequacy of documentation and does not constitute the [residual
5 functional capacity] assessment.” POMS DI 24510.060. Instead, the actual
6 residual functional capacity assessment is recorded in the narrative provided on the
7 MRFCA, explaining the conclusions indicated in the moderate limitations
8 expressed above the narrative. *Id.* Therefore, the opined residual functional
9 capacity assessment was not the moderate limitations given by Dr. Fitterer, but the
10 narrative sections.

11 The opinion expressed in the narrative section is adequately represented in
12 the residual functional capacity determination, which limits Plaintiff to simple,
13 routine, and repetitive tasks and work away from the general public. Tr. 19-20. As
14 such, the ALJ did not error in her treatment of Dr. Fitterer’s opinion.

15 **2. Dennis R. Pollack, Ph.D.**

16 In August of 2013, Dr. Pollack met with and administered physiological
17 testing to Plaintiff. Tr. 715-725. The Wechsler Adult Intelligence Scale-IV
18 (WAIS-IV) revealed a Full Scale IQ of 116, in the High Average range, and all the
19 subtests were in the average to superior range. Tr. 718. The Minnesota
20 Multiphasic Personality Inventory-2 (MMPI-2) gave Plaintiff “mildly elevated
21 scores for the L scale and indicating that he was attempting to present himself in a
22 most favorable light and that he was most likely understating his difficulties. At
23 the same time he is reporting some unusual experiences that most people do not
24 have.” *Id.* His Aphasia Screening Test demonstrated dyscalculia. Tr. 719.
25 Validity testing showed no indication of malingering. *Id.* The Millon Clinical
26 Multiaxial Inventory-III (MCMI-III) gave him acceptable scores and included an
27 elevated score for anxiety. *Id.* Dr. Pollack diagnosed Plaintiff with an anxiety
28 disorder, ADHD, and a personality disorder with schizoid and dependent traits. Tr.

1 721. Dr. Pollack then completed a Mental Medical Source Statement stating that
2 Plaintiff had a marked² limitation in the ability to perform activities within a
3 schedule, maintain regular attendance, and be punctual within customary
4 tolerances, and the ability to complete a normal workday and workweek without
5 interruptions from psychologically based symptoms and to perform at a consistent
6 pace without an unreasonable number and length of rest periods. Tr. 723. He also
7 stated that Plaintiff would have a moderate³ limitation in the ability to maintain
8 attention and concentration for extended periods and the ability to accept
9 instructions and respond appropriately to criticism from supervisors. Tr. 723.

10 The ALJ gave Dr. Pollack’s opinion little weight because (1) the intelligence
11 test scores were inconsistent with his opinion expressed on the Mental Medical
12 Source Statement, (2) the limitations were based on self-reports including the
13 subjective responses on the MMPI-2 and MCMI-III, (3) the test results showing
14 high scores in anxiety were inconsistent with the treatment records, and (4)
15 Plaintiff’s activities were inconsistent with the Dr. Pollack’s conclusion of
16 avoidance.

17 The ALJ’s first reason for giving Dr. Pollack’s opinion little weight, that the
18 intelligence test scores were inconsistent with the opinion on the Mental Medical
19 Source Statement, is legally sufficient. Internal inconsistencies between the
20 physician’s opinion and the physician’s report meets the clear and convincing
21 standard. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). Here, the ALJ
22 found that “[t]he WAIS-IV results average to superior range are not indicative of
23 difficulty with concentration, confused thinking, and forgetfulness, which Dr.

24
25 ²A marked limitation is defined as a “[f]requent interference on the ability to
26 function in a work setting.” Tr. 722.

27 ³A moderate limitation is defined as an “[o]ccasional interference on the
28 ability to function in a work setting.” Tr. 722.

1 Pollack neglected to point out.” Tr. 25. Considering the high scores on the WAIS-
2 IV, the ALJ’s finding was supported by substantial evidence and legally sufficient.

3 Plaintiff acknowledged that his intelligence test were better than average, but
4 argued that the lower score in short term memory and eye-hand motor coordination
5 had a great effect on his work performance and interaction with supervisors. ECF
6 No. 18 at 15. Dr. Pollack recognized that Plaintiff’s “lowest score was a scaled
7 score of 9 for the Coding subtest, a measure of short term memory and eye-hand
8 coordination.” Tr. 718. However, Dr. Pollack gave no indication that this was
9 below average or corresponded to a negative performance in specific workplace
10 abilities. *Id.*

11 The ALJ’s second reason for rejecting Dr. Pollack’s opinion, that he relied
12 on Plaintiff’s self-reports and the subjective responses on the MMPI-2 and MCMI-
13 III, is not legally sufficient. An ALJ may discount a treating provider’s opinion if
14 it appears it is based on a claimant’s unreliable self-reports, but the ALJ must
15 provide the basis for her conclusion that the opinion was based on a claimant’s
16 self-reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here, the
17 basis provided by the ALJ was that Dr. Pollack relied on the MMPI-2 and MCMI-
18 III and these tests were based on subjective responses from the Plaintiff. Tr. 25.
19 The MMPI-2 is an objectively interpreted instrument with empirically validated
20 scales possessing clearly established meanings. KENNETH S. POPE ET AL., THE
21 MMPI, MMPI-2 AND MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT
22 WITNESSES AND ATTORNEYS 12 (3rd ed. 2006). The MCMI-III is a “rationally
23 derived scale that assesses individuals according to Millon’s (*e.g.*, 1969, 1981,
24 1987, 1994) conceptualization of clinical and personality disorders.” *Id.* at 455.
25 Therefore, the ALJ’s conclusion that Dr. Pollack’s reliance on these tests equates
26 to reliance on subjective accounts from Plaintiff, is not accurate. While the ALJ
27 erred in this reason for the weight prescribed to Dr. Pollack’s opinion, this error is
28 harmless as she provided other legally sufficient reasons supported by substantial

1 evidence. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An
2 error is harmless when “it is clear from the record that the . . . error was
3 inconsequential to the ultimate nondisability determination.”).

4 The third reason the ALJ provided for giving Dr. Pollack’s opinion little
5 weight, that the test results showing high scores in anxiety were inconsistent with
6 the treatment records, is legally sufficient. The ALJ found that MCMI-III results
7 showing high levels of anxiety were not consistent with the medical records. Tr.
8 25. The ALJ was accurate. The MCMI-III results showed Plaintiff’s Clinical
9 Syndrome BR score was elevated for anxiety. Tr. 719. However, the record
10 frequently showed mild anxiety or none at all. Tr. 537, 539, 541, 543, 550, 624,
11 642, 646, 668, 674, 699, 708, 745. While the records from Frontier Behavioral
12 Health submitted after the ALJ hearing show an increase in anxiety starting in
13 December of 2012, by April of 2013, it had improved to the point Plaintiff was
14 playing games with a group on Mondays and by the end of his treatment records,
15 his mood and affect are within normal limits. Tr. 758-771, 782, 793-794, 797-798,
16 801. As such, the ALJ’s conclusion is supported by substantial evidence.

17 The ALJ’s fourth reason for giving Dr. Pollack’s opinion little weight, that
18 Plaintiff’s activities were inconsistent with the Dr. Pollack’s conclusion of
19 avoidance, is legally sufficient. A claimant’s testimony about his daily activities
20 may be seen as inconsistent with the presence of a disabling condition. *See Curry*
21 *v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990). Here, Plaintiff reported that he
22 visits friends weekly to engage in social games. Tr. 849. This is inconsistent with
23 Dr. Pollack’s conclusions of avoidance. Tr. 720. As such, the Court will not
24 disturb the ALJ’s treatment of Dr. Pollack’s opinion.

25 **3. Allen D. Bostwick, Ph.D.**

26 On August 22, 2012, Dr. Bostwick completed a psychological evaluation.
27 Tr. 610-619. Dr. Bostwick diagnosed Plaintiff with a somatization disorder with
28 probable delusional aspects associated with his physical complaints, ADHD

1 combined type by history, and schizotypal personality disorder. Tr. 618. Dr.
2 Bostwick stated that Plaintiff “will be a rather poor candidate for education and/or
3 work retraining due largely to his history of absenteeism and frequent illnesses
4 which appear to be largely associated with this Somatization Disorder.” Tr. 619.
5 While Dr. Bostwick found Plaintiff to be a poor candidate for vocational
6 retraining, he “recommended that [Plaintiff] continue with his mental health
7 treatment until he becomes stabilized and demonstrates an improved track record
8 for illness and absenteeism.” *Id.* The ALJ gave Dr. Bostwick’s opinion little
9 weight because it was (1) based on Plaintiff’s self-report and (2) not consistent
10 with the substantial evidence of record. Tr. 24.

11 The ALJ’s first reason, that it was based on Plaintiff’s unreliable self-report,
12 is legally sufficient. An ALJ may discount a treating provider’s opinion if it
13 appears it is based on a claimant’s unreliable self-reports, so long as the ALJ
14 provides the basis for her conclusion that the opinion was based on a claimant’s
15 self-reports. *Ghanim*, 763 F.3d at 1162. In his opinion, Dr. Bostwick concluded
16 Plaintiff had problems with absenteeism. Tr. 619. However, that ALJ concluded
17 that the record and Plaintiff’s other testimony did not support this conclusion.
18 Plaintiff’s no-shows to appointments were not due to illness, Tr. 554, 558, 560-
19 561, 579, 597-599, and his report of completing a three year course at the Skill
20 Center in only six months is inconsistent with a forty percent rate of absenteeism,
21 Tr. 612. The only information that supported this conclusion was Plaintiff’s
22 reported absenteeism. Tr. 619. Therefore, Dr. Bostwick’s opinion relied heavily
23 on Plaintiff’s self-reports, which the ALJ found to be unreliable. Tr. 21. Plaintiff
24 did not challenge the ALJ’s credibility determination in his briefing.⁴ ECF No. 18.

25
26 ⁴The Court will not consider issues not addressed in Plaintiff’s opening
27 brief. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
28 Cir. 2008).

1 As such, this reason is a legally sufficient reason to reject Dr. Bostwick's opinion.

2 The ALJ's second reason for discounting Dr. Bostwick's opinion, that it was
3 inconsistent with the record, is legally sufficient. Inconsistency with the majority
4 of objective evidence is a sufficient reason for rejecting a physician's opinions.
5 *Batson*, 359 F.3d at 1195. The ALJ pointed out that Dr. Bostwick's reliance on
6 Plaintiff's absenteeism was not supported by his education records and there was a
7 lack of repeated injuries or illnesses to support the conclusion. Tr. 24. While
8 Plaintiff cites letters from providers stating that Plaintiff would miss school due to
9 his conditions, ECF No. 18 at 18, there is no evidence of Plaintiff's actual rate of
10 absenteeism. In fact, recent medical records show that the majority of missed
11 appointments were not medical related. *See supra*.

12 **4. John T. Jaccard, M.D.**

13 On January 24, 2013, Dr. Jaccard sent a letter stating that he was in
14 treatment at Spokane Mental Health and was diagnosed with psychosis, not
15 otherwise specified, rule out schizophrenia, generalised anxiety disorder, ADHD
16 combined, and Asperger's. Tr. 620. Dr. Jaccard ended the letter with the
17 following:

18 [His] already poor social functioning has deteriorated and the
19 Vocational Rehabilitation assessed that he was unfit for their program
20 until his anxiety was reduced to enable learning. Initial gains in
21 treatment have completely disappeared after he stopped attendance at a
22 small structured high school for adolescents with significant
23 dysfunction secondary to Axis I psychiatric disorders. Increasing
24 symptoms are also consistent with the onset of thought disorders in the
later part of the second decade of life. He is unable to live
independently. Prognosis is guarded.

25 Tr. 620. The ALJ gave the letter little weight because (1) the most recent medical
26 records from Dr. Jaccard was from December 2011, (2) treatment notes from Dr.
27 Jaccard did not suggest significant symptoms, and (3) there were no records
28 supporting a significant increase in symptoms. Tr. 25.

1 All of the ALJ's reasons focus on a lack of evidence. After the ALJ's
2 decision, Plaintiff submitted Dr. Jaccard's treatment notes from February 3, 2012
3 through August 8, 2013, Tr. 741-810, to the Appeals Council. Tr. 7, 29. While
4 this evidence was not available to the ALJ, this Court must consider evidence that
5 was submitted to the Appeals Council in determining whether the ALJ's
6 determination is supported by substantial evidence. *Brewes v. Comm'r of Soc. Sec.*
7 *Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012). This new evidence demonstrates that
8 that the ALJ's reasons may not be supported by substantial evidence.

9 However, any error resulting from the ALJ's rejection of Dr. Jaccard's
10 opinion would be harmless error. *See Tommasetti*, 533 F.3d at 1038 (An error is
11 harmless when "it is clear from the record that the . . . error was inconsequential to
12 the ultimate nondisability determination."). The opinion did not prescribe any
13 functional limitations. It simply asserted poor social functioning and anxiety being
14 present. Tr. 620. The ALJ accounted for impaired social functioning and anxiety
15 in his residual functional capacity assessment. Tr. 19-20. Furthermore, the ALJ
16 provided legally sufficient reasons for rejecting Dr. Pollack's similar conclusions
17 regarding Plaintiff's anxiety, which included specific functional limitations. As
18 such, the Court finds that the ALJ's error in weighing Dr. Jaccard's opinion was
19 inconsequential to the ultimate finding of Plaintiff's ineligibility.

20 **5. Norman Staley, M.D.**

21 On September 19, 2011, Dr. Staley reviewed the medical evidence available
22 in the record and opined that Plaintiff had a residual functional capacity with no
23 weight, postural, manipulative, or environmental restrictions. Tr. 463. The ALJ
24 gave his opinion significant weight because the opinion was supported by medical
25 evidence showing relatively normal examinations and x-rays. Tr. 24.

26 Plaintiff alleges that Dr. Staley "merely reviewed the medical record without
27 making any opinion." ECF No. 18 at 19. However, Dr. Staley stated, "[Residual
28 functional capacity] projected with no weight, postural, manipulative or

1 environmental restrictions.” Tr. 463. Therefore, Dr. Staley did provide an
2 opinion.

3 Plaintiff next alleges that the ALJ failed to recognize the diagnosis of EDS
4 or find it severe. ECF No. 18 at 19. However, the ALJ found that there was “no
5 documented laboratory findings or objective physical findings supporting a
6 diagnosis of [EDS].” Tr. 19. Regulations require that a medically determinable
7 impairment be established by objective medical evidence, a claimant’s statement of
8 symptoms, a diagnosis, or a medical opinion will not suffice. 20 C.F.R. § 416.921.
9 As such, the Court will not disturb the ALJ’s treatment of Dr. Staley’s opinion.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ’s findings, the Court finds the
12 ALJ’s decision is supported by substantial evidence and free of harmful legal error.
13 Accordingly, **IT IS ORDERED:**

14 1. Defendant’s Motion for Summary Judgment, **ECF No. 20**, is
15 **GRANTED.**

16 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 18**, is **DENIED.**
17 The District Court Executive is directed to file this Order and provide a copy to
18 counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
19 **and the file shall be CLOSED.**

20 DATED August 14, 2017.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE