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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RICHARD JOHN SCOVILLE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:16-CV-00180-JTR

ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 16. Attorney Rosemary B. Schurman represents Richard John Scoville (Plaintiff); Special Assistant United States Attorney Jennifer A. Kenney represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on May 6, 2012, Tr. 216, alleging disability since October 31, 2010, Tr. 197-202, due to hepatitis C, Rocky Mountain Spotted Fever with inflammation around the heart, and high blood pressure, Tr. 231. The

1 applications were denied initially and upon reconsideration. Tr. 103-111.
2 Administrative Law Judge (ALJ) Donna L. Walker held a hearing on November
3 26, 2014 and heard testimony from Plaintiff, medical expert Minh Vu, M.D., and
4 vocational expert Daniel McKinney. Tr. 48-67. At the hearing, Plaintiff, through
5 his attorney, amended his onset date to February 15, 2012. Tr. 51. The ALJ issued
6 an unfavorable decision on January 9, 2015. Tr. 12-22. The Appeals Council
7 denied review on April 28, 2016. Tr. 1-6. The ALJ's January 9, 2015 decision
8 became the final decision of the Commissioner, which is appealable to the district
9 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
10 on May 30, 2016. ECF No. 1, 4.

11 **STATEMENT OF FACTS**

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

15 Plaintiff was 55 years old at the amended date of onset. Tr. 197. Plaintiff
16 completed four or more years of college in 1992. Tr. 232. When applying for
17 benefits, he reported that he had stopped working as of October 31, 2010. Tr. 231.
18 His work history included being a painter and working with log furniture. Tr. 232,
19 257-260. In August of 2012, Brian LaSalle, ARNP stated that Plaintiff had a
20 history of working in the construction trades and was presently working as a
21 concrete finisher. Tr. 302. In June of 2013, Plaintiff reported to the Spokane Foot
22 Clinic that he had been getting a rental property ready and had been on his feet for
23 long hours. Tr. 382. At the hearing, Plaintiff testified that he had been paid "under
24 the table" for most of his work as an adult. Tr. 61.

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 be set aside if the proper legal standards were not applied
15 in weighing the evidence and making the decision. *Brawner v. Secretary of Health*
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 SEQUENTIAL EVALUATION PROCESS

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
20 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
21 through four, the burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
23 burden is met once the claimant establishes that physical or mental impairments
24 prevent him from engaging in his previous occupations. 20 C.F.R. §§
25 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
26 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
27 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
28 exist in the national economy which the claimant can perform. *Batson v. Comm'r*

1 of Soc. Sec. Admin., 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If the claimant
2 cannot make an adjustment to other work in the national economy, a finding of
3 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On January 9, 2015, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since February 15, 2012, the amended date of onset. Tr. 14.

9 At step two, the ALJ determined Plaintiff had the following severe
10 impairments: hepatitis C; liver cirrhosis; and polyarthralgias. Tr. 14.

11 At step three, the ALJ found Plaintiff did not have an impairment or
12 combination of impairments that met or medically equaled the severity of one of
13 the listed impairments. Tr. 16.

14 At step four, the ALJ assessed Plaintiff’s residual function capacity and
15 determined he could perform a full range of medium work, stating “[h]e can lift
16 and/or carry up to 50 pounds occasionally (1/3 of the workday) and 25 pounds
17 frequently (2/3 of the workday). He can stand and/or walk up to 6 hours and sit up
18 to 6 hours in an 8-hour workday.” Tr. 17. The ALJ identified Plaintiff’s past
19 relevant work as furniture assembler, painter, and sign painter. Tr. 20. The ALJ
20 concluded that Plaintiff was able to perform his past relevant work. *Id.*

21 In the alternative to a step four determination, at step five, the ALJ
22 determined that, considering Plaintiff’s age, education, work experience and
23 residual functional capacity, and based on the testimony of the vocational expert,
24 there were other jobs that exist in significant numbers in the national economy
25 Plaintiff could perform, including the jobs of janitor/cleaner and machine
26 packager. Tr. 21. The ALJ concluded Plaintiff was not under a disability within
27 the meaning of the Social Security Act at any time from February 15, 2012 through
28 the date of the ALJ’s decision, January 9, 2015. Tr. 21.

1 **ISSUES**

2 The question presented is whether substantial evidence supports the ALJ’s
3 decision denying benefits and, if so, whether that decision is based on proper legal
4 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh
5 medical source opinions in the file; (2) failing to form an accurate residual
6 functional capacity determination, and (3) failing to properly consider the
7 testimony of a lay witness.¹

8 **DISCUSSION**

9 **A. Medical Source Opinions**

10 Plaintiff argues the ALJ failed to properly consider and weigh the medical
11 opinion expressed by James Pittman, Ph.D., ARNP, Minh Vu, M.D., Brian
12 LaSalle, ARNP, and Howard Platter, M.D. ECF No. 15 at 3-17.

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 _____
25 ¹Plaintiff addressed issues one and two as major headings in his briefing.
26 ECF No. 15. However, he referenced issue three as part of his residual functional
27 capacity argument. *Id.* at 19. Therefore, for clarity, the Court has separated the
28 residual functional capacity argument from the lay witness testimony argument.

1 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
2 physician’s opinion is contradicted by another physician, the ALJ is only required
3 to provide “specific and legitimate reasons” for rejecting the opinion. *Murray v.*
4 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
5 physician’s opinion is not contradicted by another physician, the ALJ may reject
6 the opinion only for “clear and convincing” reasons, and when an examining
7 physician’s opinion is contradicted by another physician, the ALJ is only required
8 to provide “specific and legitimate reasons” to reject the opinion. *Lester*, 81 F.3d
9 at 830-831.

10 The specific and legitimate standard can be met by the ALJ setting out a
11 detailed and thorough summary of the facts and conflicting clinical evidence,
12 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
13 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
14 conclusions, she “must set forth [her] interpretations and explain why they, rather
15 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
16 1988).

17 **1. James Pittman, Ph.D., ARNP**

18 On October 15, 2014, Dr. Pittman completed a mini-mental status
19 examination and completed written questions submitted by Plaintiff’s attorney. Tr.
20 368-381. In these questions, Dr. Pittman opined that Plaintiff could occasionally
21 lift and carry 50 pounds, frequently lift and carry 25 pounds, stand and walk for a
22 total of 3 hours in an 8 hour work day, sit for a total of 3 hours in an 8 hour work
23 day, sit at one time for 30 minutes, stand at one time for 30 minutes, frequently
24 twist, handle, finger, and feel, and occasionally, stoop, crouch, climb stairs, climb
25 ladders, reach, and push/pull. Tr. 372-376. Additionally, he would need to walk
26 every 20 minutes for relief from sitting, need to shift at will between sitting or
27 standing/walking, need to lie down up to two times in an eight hour period, and
28 occasionally need to use a cane. *Id.* He opined that Plaintiff’s pain would reduce

1 concentration or attention significantly and produce emotional stress or reduce the
2 ability to cope with stress 50 percent of the time. Tr. 377. Dr. Pittman also
3 completed a medical source opinion on Plaintiff's mental functioning, in which he
4 opined Plaintiff would have difficulty in several areas. Tr. 379-380.

5 The ALJ gave this opinion no weight because it was inconsistent with his
6 treatment notes in 2013 and the treatment note completed with the opinion,
7 specifically noting that the treatment note found Plaintiff's gait was unremarkable
8 with no mention of sensation testing, Tr. 349, and this was inconsistent with the
9 opinion, which noted Plaintiff had decreased vibratory and monofilament
10 sensation, an abnormal gain, and occasionally needed the use of a cane, Tr. 375-
11 376. Additionally, the ALJ noted that the mini-mental status exam was within
12 normal limitations, which did not support the later opinion that Plaintiff's pain
13 would reduce his concentration or cause emotional stress or result in a limited
14 mental functioning. Tr. 19-20.

15 As Defendant argues, despite Dr. Pittman's Ph.D., he is not considered an
16 acceptable medical source. *See* ECF No. 16 at 7-8. Acceptable medical sources
17 are licensed physicians, licensed or certified psychologists, licensed optometrists,
18 licensed podiatrists, and qualified speech-language pathologists. 20 C.F.R. §§
19 404.1502, 416.902. Dr. Pittman's Ph.D. is in nursing. *See* Country Homes Nurse
20 Practitioners, [http://www.countryhomesnursepractitioners.com/The-Nurse-
21 Practitioners.html](http://www.countryhomesnursepractitioners.com/The-Nurse-Practitioners.html) (last accessed December 6, 2016). He qualifies as a nurse
22 practitioner, which for claims filed with the agency prior to March 27, 2017 is not
23 considered an acceptable medical source. 20 C.F.R. §§ 404.1502, 416.902.

24 An ALJ is required to consider evidence from non-acceptable medical
25 sources and non-medical sources. 20 C.F.R. §§ 404.1527(f), 416.927(f). An ALJ
26 must give "germane" reasons to discount evidence from non-acceptable medical
27 sources and non-medical sources. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th
28 Cir. 2014).

1 Here, the ALJ provides examples supported by substantial evidence of how
2 Dr. Pittman's records do not support his opinion. As such, the ALJ has provided
3 legally sufficient reasons for rejecting Dr. Pitman's opinion.

4 **2. Minh Vu, M.D., F.C.C.P.**

5 At the November 26, 2014 hearing, Dr. Vu testified that he had reviewed the
6 record through exhibit 13F and he asked Plaintiff multiple questions regarding his
7 medical history. Tr. 53-55. Dr. Vu testified that Plaintiff had hepatitis C,
8 hypertension without any complications, a history of Rocky Mountain Spotted
9 Fever, and an undocumented mention of anxiety. Tr. 55-56. Dr. Vu testified that
10 based on the fact that Plaintiff still had a liver problem as evidenced in 2013 testing
11 and a lack of evidence showing that his liver returned to normal functioning after
12 his hepatitis C treatment, he was limited to a full range of light work. Tr. 56.

13 The ALJ gave Dr. Vu's opinion no weight because it was based on a lack of
14 follow up laboratory studies that indicated Plaintiff's hepatitis C was in sustained
15 remission. Tr. 20. The ALJ noted that testing at week four of treatment and again
16 in June of 2014 had shown undetectable viral loads and Plaintiff's failure to
17 perform the requested laboratory studies in early treatment and at 12 weeks post
18 treatment did not negate the negative findings. Tr. 20 *citing* Tr. 425, 435, 444,
19 446. The ALJ deemed that these test results showed that Plaintiff's hepatitis C was
20 in sustained remission. *Id.*

21 The record is void of any provider stating that Plaintiff's disease was in
22 sustained remission, only that Plaintiff had failed to obtain the testing necessary to
23 establish whether or not had "achieve[d] a sustained viral response." Tr. 446, 459.
24 However, in the evidence not reviewed by Dr. Vu was an August 4, 2014 Viral
25 Load test that showed no virus was detected.² Tr. 482. Considering his viral load
26

27 ²On April 3, 2014, Plaintiff was 8 weeks into his 12 week course. Tr. 435.
28 Therefore, he had 4 weeks remaining in treatment plus the 12 week post treatment

1 was undetectable after 12 weeks post treatment, he had achieved a sustained viral
2 response. While the ALJ is not a physician and cannot determine if a claimant has
3 reached “sustained remission,” the substantial evidence supports the notion that
4 Plaintiff’s treatment was a success, which supports the ALJ’s rejection of Dr. Vu’s
5 opinion. While the ALJ did not specifically cite to the August 4, 2014 testing to
6 support his determination, it further supports his rationale for rejecting Dr. Vu’s
7 opinion. *See Tackett*, 180 F.3d at 1098 (“a court must consider the record as a
8 whole” when determining if the ALJ erred). As such, the ALJ’s determination is
9 supported by substantial evidence.

10 Further, the ALJ noted that Plaintiff was found to be asymptomatic prior to
11 treatment. Tr. 20 *citing* Tr. 405. The full statement in Dr. Ferrin’s report was
12 “[h]e is feeling fatigued lately but is otherwise asymptomatic from his liver
13 disease.” ECF No. 15 at Tr. 405. Additionally, the ALJ found Plaintiff to have no
14 significant side effects from the Interferon that required treatment. Tr. 20 *citing*
15 Tr. 425. Dr. Ferrin’s statement regarding Plaintiff’s fatigue was Plaintiff’s
16 subjective report, which the ALJ found less than fully credible and Plaintiff did not
17 challenge. As such, these statements support the ALJ’s determination that Dr.
18 Vu’s opinion was inconsistent with Plaintiff being asymptomatic prior to treatment
19 and having no significant side effects from the treatment itself. As such, the ALJ
20 did not error in his treatment of Dr. Vu’s opinion.

21 **3. Brian LaSalle, ARNP**

22 On August 29, 2012, Nurse LaSalle completed a Physical Functional
23 Evaluation form for the Washington Department of Social and Health Services.
24 Tr. 297-299. Nurse LaSalle limited Plaintiff to medium work, defined as “[a]ble to
25 lift 50 pounds maximum and frequently lift and/or carry up to 25 pounds.” Tr.

26 _____
27 wait would place the appropriate testing any time after July 24, 2014. Therefore,
28 the August 4, 2014 test is more than twelve weeks post treatment

1 299.

2 The ALJ gave this opinion significant weight, citing S.S.R. 06-03p. Tr. 19.
3 Social Security Ruling 06-03p sets forth factors for an ALJ to consider when
4 addressing evidence from an other source and allows an ALJ to give more weight
5 to non-acceptable medical sources than to acceptable medical sources. Tr. 19.
6 Here, Nurse LaSalle was Plaintiff's treating source and his opinion was consistent
7 with that of Dr. Platter. Considering the ALJ provided legally sufficient reasons
8 for rejecting the opinions contrary to Nurse LaSalle, the Court will not disturb the
9 weight given to it by the ALJ.

10 **4. Howard Platter, M.D.**

11 On December 13, 2012, Dr. Platter reviewed Plaintiff's available records
12 and opined Plaintiff could occasionally lift and/or carry 50 pounds, frequently
13 lifting and/carry 25 pounds, stand and/or walk six hours, sit more than six hours,
14 and push and/or pull unlimited. Tr. 100.

15 The ALJ gave this opinion significant weight, stating that it was supported
16 by the longitudinal medical record, which showed primarily a diagnosis of
17 hepatitis C with liver cirrhosis that had been treated. Tr. 18-19. As discussed
18 above, August 4, 2014 testing showed that Plaintiff had a non-detected viral load
19 after 12 weeks post treatment. Tr. 482. Therefore, the ALJ's conclusion is
20 supported by substantial evidence. Considering the ALJ provided legally sufficient
21 reasons for rejecting the opinions of other providers whose opinions varied in the
22 record, the Court will not disturb the weight given to Dr. Platter and Nurse LaSalle.

23 **B. Residual Functional Capacity**

24 Plaintiff argues the ALJ's residual functional capacity determination is in
25 error because it failed to consider limitations resulting from fatigue from cirrhosis,
26 hepatitis, and Rocky Mountain Spotted Fever and pain from Plaintiff's
27 polyarthralgias. ECF No. 15 at 19-20.

28 A claimant's residual functional capacity is "the most [a claimant] can still

1 do despite [his] limitations.” 20 C.F.R. § 416.945(a)(1); *see also* 20 C.F.R. Part
2 404, Subpart P, Appendix 2, § 200.00(c) (defining residual functional capacity as
3 the “maximum degree to which the individual retains the capacity for sustained
4 performance of the physical-mental requirements of jobs.”). In formulating a
5 residual functional capacity determination, the ALJ weighs medical and other
6 source opinions and also considers the claimant’s credibility and ability to perform
7 daily activities. *See, e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226
8 (9th Cir. 2009).

9 The ALJ addressed Plaintiff’s complaints of fatigue and pain when
10 discussing Plaintiff’s testimony. Tr. 17-18. The ALJ found the intensity,
11 persistence, and limiting effects of the fatigue and pain as Plaintiff alleged to be
12 unreliable. Tr. 18. Plaintiff did not challenge the ALJ’s determination regarding
13 the credibility of his symptom statements in briefing. Therefore, the Court will not
14 consider a challenge to Plaintiff’s credibility. *See Carmickle v. Comm’r, Soc. Sec.*
15 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (The court ordinarily will not
16 consider matters on appeal that are not specifically and distinctly argued in an
17 appellant’s opening brief). As such, the ALJ considered limitations from
18 Plaintiff’s fatigue and pain as she saw appropriate and this Court will not disturb
19 her determination.

20 **C. Lay Witness Testimony**

21 Plaintiff challenges the treatment of a written statement from Plaintiff’s
22 roommate, Nadine Van Stone. ECF No. 15 at 19.

23 An ALJ is required to consider evidence from non-medical sources
24 including the evidence from family and friends “as to how an impairment affects a
25 claimant’s ability to work,” *Sprague*, 812 F.2d at 1232; 20 C.F.R. §§ 404.1527(f),
26 416.927(f). An ALJ must give reasons that are “germane” to each witness to
27 discount the testimony of each lay witness. *Dodrill v. Shalala*, 12 F.3d 915, 919
28 (9th Cir. 1993).

1 The ALJ considered Ms. Van Stone's written statement, finding that the
2 statement was "well written, and certainly supportive of the claimant; however, it
3 does not overcome the objective evidence contained in this record that references
4 being 'asymptomatic' prior to treatment at 13F/23, and having no significant side
5 effects from the Interferon requiring treatment (13F/43), or the references to
6 significant activities of daily living." Tr. 18. The ALJ's statement demonstrates
7 that she considered the statement and provided reasons germane to Ms. Van Stone
8 in concluding that it was due little weight.

9 **CONCLUSION**

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

13 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
14 **GRANTED.**

15 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

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

19 DATED August 22, 2017.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE