

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

Mar 20, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

DARREN H.,
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:18-cv-00104-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 20

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 18, 20. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion, ECF No. 18, and denies Defendant's motion, ECF No. 20.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

1 **STANDARD OF REVIEW**

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

13 In reviewing a denial of benefits, a district court may not substitute its
14 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
15 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
16 rational interpretation, [the court] must uphold the ALJ’s findings if they are
17 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
18 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
19 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
20 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within
6 the meaning of the Social Security Act. First, the claimant must be “unable to
7 engage in any substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or which
9 has lasted or can be expected to last for a continuous period of not less than twelve
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
11 impairment must be “of such severity that he is not only unable to do his previous
12 work[,] but cannot, considering his age, education, and work experience, engage in
13 any other kind of substantial gainful work which exists in the national economy.”
14 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
17 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
18 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
19 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
20

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
6 claimant suffers from "any impairment or combination of impairments which
7 significantly limits [his] physical or mental ability to do basic work activities," the
8 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant's impairment does not satisfy this severity threshold, however, the

10 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
11 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant's impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude
14 a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant's impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must pause to assess
20 the claimant's "residual functional capacity." Residual functional capacity (RFC),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his limitations, 20 C.F.R. §§ 404.1545(a)(1),
3 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's
5 RFC, the claimant is capable of performing work that he performed in the past
6 (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
7 claimant can perform past relevant work, the Commissioner must find that the
8 claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is
9 incapable of performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant can perform other work in the national economy. 20 C.F.R. §§
12 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the
13 Commissioner must also consider vocational factors such as the claimant's age,
14 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
15 416.920(a)(4)(v). If the claimant can adjust to other work, the Commissioner must
16 find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).
17 If the claimant is not capable of adjusting to other work, analysis concludes with a
18 finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R.
19 §§ 404.1520(g)(1), 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
4 capable of performing other work; and 2) such work “exists in significant numbers
5 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
6 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 “A finding of ‘disabled’ under the five-step inquiry does not automatically
8 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
9 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).

10 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
11 determine whether the drug or alcohol addiction is a material factor contributing to
12 the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). In order to determine
13 whether drug or alcohol addiction is a material factor contributing to the disability,
14 the ALJ must evaluate which of the current physical and mental limitations would
15 remain if the claimant stopped using drugs or alcohol, then determine whether any
16 or all of the remaining limitations would be disabling. 20 C.F.R. §§
17 404.1535(b)(2), 416.935(b)(2). If the remaining limitations would not be
18 disabling, DAA is a material contributing factor to the determination of disability.

19 *Id.* If the remaining limitations would be disabling, the claimant is disabled
20 independent of the DAA and the addiction is not a material contributing factor to

1 disability. *Id.* Plaintiff has the burden of showing that DAA is not a material
2 contributing factor to disability. *See Parra*, 481 F.3d at 748.

3 **ALJ'S FINDINGS**

4 On July 1, 2014, Plaintiff applied for Title II disability insurance benefits
5 and Title XVI supplemental security income benefits, Tr. 276-85, alleging an
6 amended onset date of August 1, 2012, Tr. 131. The applications were denied
7 initially, Tr. 196-209, and on reconsideration, Tr. 212-21. Plaintiff appeared
8 before an administrative law judge (ALJ) on July 19, 2016. Tr. 115-45. On
9 September 7, 2016, the ALJ denied Plaintiff's claim. Tr. 17-38.

10 At step one of the sequential evaluation process, the ALJ found Plaintiff has
11 not engaged in substantial gainful activity since August 1, 2012. Tr. 23. At step
12 two, the ALJ found that Plaintiff has the following severe impairments: substance
13 addiction disorders, secondary cyclic vomiting; major depressive disorder;
14 generalized anxiety disorder; and posttraumatic stress disorder. Tr. 23.

15 At step three, the ALJ found Plaintiff's impairments, including the substance
16 use disorders, meet Listings 12.04 (affective disorder), 12.06 (anxiety disorder),
17 and 12.09 (substance abuse disorder) of 20 C.F.R. Part 404, Subpart P, Appendix
18 1. Tr. 24. However, the ALJ found that, if Plaintiff stopped the substance use, he
19 would not have an impairment or combination of impairments that meets or
20 medically equals any of the impairments listed in 20 C.F.R. Part 404, Subpart P,

1 Appendix 1. Tr. 26. The ALJ then found that, if Plaintiff stopped the substance
2 abuse, Plaintiff would have the RFC to perform a full range of work at all
3 exertional levels, with the following non-exertional limitations:

4 Regarding understanding and memory, [Plaintiff] has the unlimited
5 ability to remember locations and work-like procedures, and
6 remember short, simple instructions. He has the ability to work 40-
7 hours per week with legally required breaks, on a sustained basis in
8 a competitive environment; maintain attention and concentration
9 for extended periods (with legally required breaks); perform
10 activities within a schedule, maintain regular attendance, and be
11 punctual within customary tolerances; sustain an ordinary routine
12 without special supervision; work in coordination with or in
13 proximity to others without being distracted by them; and make
14 simple work-related decisions. He would work best with superficial
15 contact with the general public. He has the ability to accept
16 instructions or respond appropriately to criticism from supervisors.
17 He would work best in proximity to, but without close cooperation
18 with co-workers. He has the ability to respond appropriately to
19 changes in the work setting. He would work best in an environment
20 that is routine and predictable. He has the ability to travel to
unfamiliar places or use public transportation. He would work best
in an environment where goals and expectations are clearly
established.

15 Tr. 27-28.

16 At step four, the ALJ found Plaintiff is able to perform his past relevant
17 work as a material handler if he stopped substance abuse. Tr. 31. In the
18 alternative, at step five, the ALJ found that, considering Plaintiff's age, education,
19 work experience, RFC, and testimony from the vocational expert, there were jobs
20 that existed in significant numbers in the national economy that Plaintiff could

1 perform if he stopped substance abuse, such as, fish cleaner, dining room
2 attendant, and cleaner/housekeeping. Tr. 32. The ALJ then concluded that
3 because substance abuse is a material contributing factor to the determination of
4 disability Plaintiff has not been disabled within the meaning of the Social Security
5 Act at any time from the alleged onset date of August 1, 2012, through the date of
6 the ALJ's decision. Tr. 33.

7 On January 30, 2018, the Appeals Council denied review of the ALJ's
8 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
9 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

10 ISSUES

11 Plaintiff seeks judicial review of the Commissioner's final decision denying
12 him disability insurance benefits under Title II and supplemental security income
13 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
14 issues for review:

- 15 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 16 2. Whether the ALJ properly determined that his substance-use disorder is a
17 material contributing factor to the determination of disability; and
- 18 3. Whether the ALJ properly incorporated the opined limitations into the
19 RFC.

20 ECF No. 18 at 4-20.

1 **DISCUSSION**

2 **A. Medical Opinion Evidence**

3 Plaintiff faults the ALJ for improperly discounting the opinions of Gregory
4 Charboneau, Ed.D.; Steven Johansen, Ph.D.; and Kayleen Islam-Zwart, Ph.D.¹
5 ECF No. 18 at 12-20.

6 There are three types of physicians: “(1) those who treat the claimant
7 (treating physicians); (2) those who examine but do not treat the claimant
8 (examining physicians); and (3) those who neither examine nor treat the claimant
9 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
10 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
11 Generally, a treating physician’s opinion carries more weight than an examining
12 physician’s opinion, and an examining physician’s opinion carries more weight
13 than a reviewing physician’s opinion. *Id.* at 1202.

14 _____
15 ¹ Plaintiff also argued the ALJ improperly credited the opinions of Janis Lewis,
16 Ph.D.; Renee Eisenhauer, Ph.D.; and Dan Donahue, Ph.D. As is explained *infra*,
17 the ALJ erred by discounting the opinions of Dr. Charboneau, Dr. Johansen, and
18 Dr. Islam-Zwart without providing meaningful analysis. Therefore, the Court need
19 not address Plaintiff’s arguments as to Dr. Lewis, other than as discussed in the
20 Court’s DAA analysis, or as to Dr. Eisenhauer and Dr. Donahue.

1 If a treating or examining physician’s opinion is uncontradicted, the ALJ
2 may reject it only by offering “clear and convincing reasons that are supported by
3 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 “However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory, and inadequately supported
6 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
8 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
9 may only reject it by providing specific and legitimate reasons that are supported
10 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
11 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
12 serve as substantial evidence if it is supported by other independent evidence in the
13 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

14 *1. Dr. Charboneau and Dr. Johansen*

15 In May 2014, Dr. Charboneau performed a State psychological evaluation,
16 Tr. 589-93, and diagnosed Plaintiff with generalized anxiety disorder,
17 posttraumatic stress disorder, and alcohol dependence (early remission), Tr. 590.
18 Dr. Charboneau opined that Plaintiff had marked limitations in the abilities to learn
19 new tasks, ask simple questions, request assistance, and maintain appropriate
20 behavior in a work setting, and moderate limitations in the abilities to understand,

1 remember, and persist in tasks by following detailed instructions; perform
2 activities within a schedule, maintain regular attendance, and be punctual within
3 customary tolerances without special supervision; perform routine tasks without
4 special supervision; adapt to changes in a routine work setting; make simple work-
5 related decisions; be aware of normal hazards and take appropriate precautions;
6 communicate and perform effectively in a work setting; complete a normal work
7 day and workweek without interruptions from psychologically based symptoms;
8 and set realistic goals and plan independently. Tr. 591. Dr. Charboneau opined
9 that Plaintiff's impairments were not primarily the result of alcohol or drug use
10 within the past sixty days and that the impairments would persist following sixty
11 days of sobriety. Tr. 592, 598.

12 In May 2014, Dr. Johansen reviewed Dr. Charboneau's opinion and agreed
13 with Dr. Charboneau's diagnosis of anxiety disorder and post-traumatic stress
14 disorder and the assessed marked and moderate limitations. Tr. 594-98. Dr.
15 Johansen assessed a severity rating of three (moderate) for Plaintiff's mood
16 disturbance, guilt, sleep disturbance, anxiety, and decreased energy. Tr. 598; 20
17 C.F.R. Pt. 404, Subpt. P, App. 12.00.F.2. Dr. Johansen opined that Plaintiff's
18 impairments were not due to substance abuse or chemical dependency, stating,
19 "cannabis and alcohol appear more salient [than use of other drugs], but do not
20 appear to render primary impairment." Tr. 595, 598.

1 The ALJ assigned partial weight to Dr. Charboneau's and Dr. Johansen's
2 opinions. Tr. 29-30. Because these opinions were contradicted by the
3 nonexamining opinions of Dr. Eisenhauer and Dr. Donahue, Tr. 152-54, 178-83,
4 the ALJ was required to provide specific and legitimate reasons for discounting Dr.
5 Charboneau's and Dr. Johansen's opinions. *See Bayliss*, 427 F.3d at 1216.

6 The ALJ discounted Dr. Charboneau's and Dr. Johansen's opinions in part
7 because they did not differentiate between Plaintiff's functioning with and without
8 substance abuse. Tr. 30. While an ALJ may discount a medical opinion that does
9 not consider a claimant's ongoing substance abuse, *Cothrell v. Berryhill*, 742 Fed.
10 App'x 232, 236 (9th Cir. July 18, 2018) (unpublished opinion); *Chavez v. Colvin*,
11 No. 3:14-cv-01178-JE, 2016 WL 8731796, at *8 (D. Or. July 25, 2016)
12 (unpublished opinion), here, both Dr. Charboneau and Dr. Johansen considered
13 Plaintiff's substance abuse. Tr. 590-92, 595, 598. Dr. Charboneau concluded that
14 Plaintiff's anxiety and PTSD were not primarily the result of alcohol or drug use
15 within the past sixty days and that the impairments would persist following sixty
16 days of sobriety. Tr. 592. Likewise, Dr. Johansen considered Plaintiff's substance
17 abuse and determined that the abuse was not material to the diagnosed conditions
18 and related impairments. Tr. 595, 598. Defendant failed to address this argument.
19 The ALJ erred by discounting these opinions on the grounds that the psychologists
20 did not differentiate between functioning with and without substance abuse without

1 addressing these findings. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th
2 Cir. 2015) (demanding that the ALJ set forth its reasoning in a way that allows for
3 meaningful review); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1998).

4 Because the ALJ deemed Plaintiff capable of performing work if he stopped
5 abusing substances, contrary to the opinions of Dr. Charboneau and Dr. Johansen,
6 the ALJ's decision to discount these opinions for failing to differentiate between
7 functioning with and without substance abuse was not harmless. *See Molina*, 674
8 F.3d at 1111.

9 *2. Dr. Islam-Zwart*

10 In May 2016, Dr. Islam-Zwart performed a State psychological evaluation,
11 Tr. 708-16, and diagnosed Plaintiff with major depressive disorder (recurrent,
12 moderate), generalized anxiety disorder, unspecified attention deficit hyperactivity
13 disorder, and alcohol use disorder (moderate) in remission, Tr. 709. Dr. Islam-
14 Zwart opined marked limitations in Plaintiff's abilities to perform activities within
15 a schedule, maintain regular attendance, and be punctual within customary
16 tolerances without special supervision; adapt to changes in a routine work setting;
17 and communicate and perform effectively in a work setting. Tr. 709. Dr. Islam-
18 Zwart opined moderate limitations in Plaintiff's abilities to understand, remember,
19 and persist in tasks by following detailed instructions; learn new tasks; perform
20 routine tasks without special supervision; ask simple questions or request

1 assistance; maintain appropriate behavior in a work setting; and complete a normal
2 workday and workweek without interruptions from psychologically based
3 symptoms. Tr. 709. Dr. Islam-Zwart opined that the overall severity of the
4 combined impact of Plaintiff's diagnosed mental impairments was moderate. Tr.
5 709. Dr. Islam-Zwart opined that Plaintiff's impairments were not the result of
6 alcohol or drug use within the past sixty days. Tr. 710.

7 The ALJ assigned no weight to portions of Dr. Islam-Zwart's opinion. Tr.
8 30. Because Dr. Islam-Zwart's opinion was contradicted by the nonexamining
9 opinions of Dr. Eisenhauer and Dr. Donahue, Tr. 152-54, 178-83, the ALJ was
10 required to provide specific and legitimate reasons for rejecting portions of Dr.
11 Islam-Zwart's opinion. *See Bayliss*, 427 F.3d at 1216.

12 First, the ALJ rejected Dr. Islam-Zwart's opinion that Plaintiff could not
13 work because it was not supported by the medical evidence. Tr. 30. An ALJ may
14 reject limitations "unsupported by the record as a whole." *Batson v. Comm'r of the*
15 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2003). The specific and legitimate
16 reason standard can be met by "setting out a detailed and thorough summary of the
17 facts and conflicting clinical evidence, [the ALJ] stating his interpretation thereof,
18 and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998);
19 *Embrey*, 849 F.2d at 421-22 (recognizing that conclusory reasons do not "achieve
20 the level of specificity" required to justify an ALJ's rejection of an opinion);

1 *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989) (deciding that an ALJ’s
2 rejection of a physician’s opinion on the ground that it was contrary to clinical
3 findings in the record was “broad and vague, failing to specify why the ALJ felt
4 the treating physician’s opinion was flawed”); *Blakes v. Barnhart*, 331 F.3d 565,
5 569 (7th Cir. 2003) (“We require the ALJ to build an accurate and logical bridge
6 from the evidence to her conclusions so that we may afford the claimant
7 meaningful review of the SSA’s ultimate findings.”). Here, the ALJ did not
8 indicate what medical evidence, other than Dr. Islam-Zwart’s examination
9 findings, as discussed *infra*, did not support the “no work” opinion. The ALJ
10 failed to compare Dr. Islam-Zwart’s findings with the other medical evidence. *See*
11 *Garrison v. Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014). Without the ALJ offering
12 more than her stated conclusion, the Court is unable to meaningfully review
13 whether the ALJ’s interpretation of the evidence, rather than Dr. Islam-Zwart’s
14 opinion, is rational. *See Brown-Hunter*, 806 F.3d at 492 (demanding that the ALJ
15 set forth its reasoning in a way that allows for meaningful review); *Embrey*, 849
16 F.2d at 421-22.

17 Second, the ALJ rejected Dr. Islam-Zwart’s opinion that Plaintiff was unable
18 to work because the opinion was inconsistent with Dr. Islam-Zwart’s examination
19 findings. Tr. 30. An ALJ may reject an opinion that is internally inconsistent or
20 unsupported by the medical source’s own data. *Tommasetti v. Astrue*, 533 F.3d

1 1035, 1041 (9th Cir. 2008); *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.
2 1996). Here, the ALJ noted that Dr. Islam-Zwart's opinion that Plaintiff was
3 unable to work due to low energy and agitation was inconsistent with the relatively
4 mild psychological abnormalities during the examination. Tr. 30. On her report,
5 Dr. Islam-Zwart checked boxes reflecting that Plaintiff's thought process and
6 content, orientation, perception, memory, fund of knowledge, and abstract thought
7 were within normal limits, but that Plaintiff's concentration, insight, and judgment
8 were both within normal limits and not within normal limits. Tr. 711. Dr. Islam-
9 Zwart supplemented these check-the-box findings with a written narrative. Tr.
10 711-16. In pertinent part, Dr. Islam-Zwart stated:

- 11 • “[Plaintiff’s] energy seemed low, but he was restless”;
- 12 • “He repeatedly expressed a wish that his girlfriend could be present”;
- 13 • “His vocabulary was adequate and he was able to respond to interview
14 questions as necessary. There was no real indication of cognitive
15 difficulty, although participating in the evaluation seemed to require a lot
16 of effort and he may have problems tracking at times. He seemed of
17 probably average intelligence”;
- 18 • “[Plaintiff] presents as lethargic and anxious”;
- 19 • “His energy level is low, but there is also indication of agitation and
20 problems with focus”; and

- “[Plaintiff’s] presentation is such that he is unable to work at this time and his prognosis for the future seems poor.”

Tr. 714-15. Based on the Mini Mental Status Exam results, Dr. Islam-Zwart found that Plaintiff exhibited mental control within normal limits; and Dr. Islam-Zwart found Plaintiff’s performance on the Trail Making Tests A and B reflected severely impaired performance. Tr. 715. Dr. Islam-Zwart found there was no indication that Plaintiff was malingering and assessed an overall severity rating of “moderate.” Tr. 709, 715. Because Dr. Islam-Zwart observed Plaintiff’s problems with focus and severe impairment on the Trail Making Tests A and B, without a more meaningful analysis by the ALJ, the Court is unable to determine if the ALJ’s decision to reject Dr. Islam-Zwart’s opinion that Plaintiff was unable to work is legitimate, specific, and supported by substantial evidence. *See Brown-Hunter*, 806 F.3d at 492 (demanding that the ALJ set forth its reasoning in a way that allows for meaningful review); *Embrey*, 849 F.2d at 421-22. Moreover, the ALJ was required to weigh Dr. Islam-Zwart’s marked and moderate limitations and consider their supportability and consistency with the record. The ALJ failed to articulate that analysis.

In summary, the ALJ erred by discounting the opinions of Dr. Charboneau, Dr. Johansen, and Dr. Islam-Zwart without providing a meaningful analysis of these opinions as compared to the record. These errors are not inconsequential. If

1 Dr. Charboneau's and Dr. Johansen's opinions that Plaintiff's DAA was not a
2 material factor contributing to disability are credited, then the ALJ's Listings
3 decision controls. *See* 20 C.F.R. §§ 404.1535, 416.935; *Parra*, 481 F.3d at 748.
4 Alternatively, and in addition, if Dr. Islam-Zwart's opinion is credited either fully
5 or partially, the ALJ must add the supported limitations to the RFC and reassess
6 whether Plaintiff is capable of performing sustained gainful work. *See Stubbs-*
7 *Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008).

8 **B. Substantial Evidence of Drug and Alcohol Abuse (DAA)**

9 Plaintiff challenges the ALJ's finding that Plaintiff's substance abuse
10 materially contributed to his limitations. ECF No. 18 at 4-12. Social Security
11 claimants may not receive benefits where DAA is a material contributing factor to
12 disability. 20 C.F.R. §§ 404.1535(b), 416.935(b); 42 U.S.C. § 423(d)(2)(c). DAA
13 is a material contributing factor if the claimant would not meet the SSA's
14 definition of disability if the claimant were not using drugs or alcohol. 20 C.F.R.
15 §§ 404.1535(b), 416.935(b). Plaintiff has the burden of showing that DAA is not a
16 material contributing factor to disability. *See Parra*, 481 F.3d at 748.

17 Plaintiff argues the ALJ failed to properly analyze his substance use
18 according to SSR 13-2p, including failing to consider 1) that the examining
19 medical opinions reflected that Plaintiff had marked social functioning difficulties;
20 2) the examining medical opinions reflected that Plaintiff had marked

1 concentration, persistence, and pace limitations; and 3) whether DAA was material
2 to Plaintiff's co-occurring mental disorder. ECF No. 18 at 4-12. The Court agrees
3 that the ALJ's analysis was deficient. First, as discussed *supra*, the ALJ erred
4 when weighing the medical evidence. Second, the ALJ's DAA analysis contained
5 no discussion of the opinions of Dr. Charboneau, Dr. Johansen, Dr. Islam-Zwart,
6 and Dr. Lewis and, more specifically, no discussion that these psychologists all
7 opined that Plaintiff's mental impairments were not primarily due to his substance
8 abuse. Tr. 590-92, 595, 598, 710, 687, 689; *see Cothrell*, 742 Fed. App'x at 235
9 (remanding for further DAA materiality analysis). It appears the ALJ failed to
10 appreciate and address that these physicians opined that Plaintiff's impairments
11 were not primarily due to substance abuse. Tr. 30; *see also* Tr. 125-26 (Dr. Glenn
12 Griffin testified that based on his review of the record he was unable to opine what
13 impact Plaintiff's substance abuse had on his mental functioning, which Dr. Griffin
14 opined was mild limitations in activities of daily living, marked limitations in
15 social functioning, and marked limitations in concentration, persistence, and pace).
16 Based on the present conclusory DAA analysis, which fails to mention or properly
17 discount the four examining and nonexamining opinions that found Plaintiff's
18 substance abuse was not primarily contributing to Plaintiff's mental limitations, the
19 Court is unable to meaningfully review the ALJ's DAA finding. *See Brown-*
20 *Hunter*, 806 F.3d at 492; *Embrey*, 849 F.2d at 421-22.

1 Defendant argues the DAA's analysis is sufficient because the ALJ
2 reasonably weighed the medical evidence and offered valid reasons for finding
3 Plaintiff's statements not wholly credible, including Plaintiff's inconsistent
4 statements, his untruthfulness to his providers regarding his substance abuse, the
5 lack of support in the objective record for Plaintiff's reports, and Plaintiff's
6 noncompliance with treatment recommendations. ECF No. 20 at 10-11. As
7 discussed *supra*, the ALJ's medical-opinion analysis was insufficient to permit for
8 meaningful review. While Plaintiff's apparent inconsistent statements about his
9 alcohol use since December 2013 may serve as a reason to discount Plaintiff's
10 reported symptoms, *see Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996), the
11 ALJ's decision to discount Plaintiff's reported symptoms was impacted by the
12 inadequate medical-evidence analysis.

13 Because the ALJ's DAA analysis lacks any meaningful analysis of the
14 medical opinions related to the impact that Plaintiff's DAA did or did not have on
15 his mental impairments and fails to cite to substantial evidence reflecting that
16 Plaintiff's mental functioning substantially would improve if he no longer abused
17 substances, the ALJ erred. This error is particularly consequential in light of the
18 ALJ's step three finding that absent substance abuse Plaintiff met Listing
19 requirements.

1 **C. RFC**

2 Plaintiff faults the ALJ for not incorporating his marked and moderate
3 limitations into the RFC. ECF No. 21 at 5. Because the ALJ erred in evaluating
4 the medical evidence and in performing the DAA analysis, this matter is being
5 remanded for additional proceedings, which will require the ALJ to reevaluate the
6 sequential analysis.

7 **D. Remedy**

8 Plaintiff urges this Court to remand for an immediate award of benefits.
9 ECF No. 18 at 20-21.

10 “The decision whether to remand a case for additional evidence, or simply to
11 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
12 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
13 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
14 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
15 1045 (9th Cir. 2017); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090,
16 1099 (9th Cir. 2014). However, the Ninth Circuit has “stated or implied that it
17 would be an abuse of discretion for a district court not to remand for an award of
18 benefits” when three credit-as-true conditions are met. *Garrison*, 759 F.3d at
19 1020. Under the credit-as-true rule, the court may remand for an award of benefits
20 if 1) the record has been fully developed and further administrative proceedings

1 would serve no useful purpose; 2) the ALJ failed to provide legally sufficient
2 reasons for rejecting evidence, whether claimant testimony or medical opinion; and
3 3) if the improperly discredited evidence were credited as true, the ALJ would be
4 required to find the claimant disabled on remand. *Revels v. Berryhill*, 874 F.3d
5 648, 668 (9th Cir. 2017).

6 Here, because the Court is unable to meaningfully assess the ALJ's DAA
7 and RFC analysis, there remains critical factual issues as to how the conflicting
8 medical evidence is to be resolved and what impact Plaintiff's substance abuse had
9 on his mental abilities. *See* 20 C.F.R. §§ 404.1535, 416.935; *Parra*, 481 F.3d at
10 748. Therefore, remand for further proceedings, rather than an award of benefits,
11 is appropriate. *See Treichler*, 775 F.3d at 1101 ("Where there is conflicting
12 evidence, and not all essential factual issues have been resolved, a remand for an
13 award of benefits is inappropriate."). On remand, the ALJ is directed to reevaluate
14 the medical opinion evidence, including the sources' opinions as to the impact of
15 alcohol use on Plaintiff's functioning, incorporate each of the supported functional
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1 limitations into the RFC, reconsider the remaining steps in the sequential analysis,
2 and reevaluate the DAA analysis.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is neither supported by substantial evidence nor free of harmful
6 legal error. Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **GRANTED**.
- 8 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.
- 9 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff

10 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
11 Security for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

12 The District Court Executive is directed to file this Order, provide copies to
13 counsel, and **CLOSE THE FILE**.

14 DATED March 20, 2019.

15 *s/Mary K. Dimke*
16 MARY K. DIMKE
17 UNITED STATES MAGISTRATE JUDGE
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