

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

Mar 22, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIEL G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-CV-0109-JTR

ORDER GRANTING, IN PART,
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 13. Attorney Joseph M. Linehan represents Daniel G. (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff’s Motion for Summary Judgment; **DENIES** Defendant’s Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits alleging disability since January 17, 2014, due to toxic mold syndrome, allergic rhinitis,

1 allergic conjunctivitis, migraine headaches, brain fog, light sensitivity, eyes rolling
2 into head, joint pain and muscle pain. Tr. 175, 185. The application was denied
3 initially and upon reconsideration. Administrative Law Judge (ALJ) Linda J. Helm
4 held a hearing in Portland, Maine, on April 14, 2016, Tr. 35-84, and issued an
5 unfavorable decision on January 25, 2017, Tr. 12-21. The Appeals Council denied
6 Plaintiff's request for review on February 6, 2018. Tr. 1-5. The ALJ's January
7 2017 decision thus became the final decision of the Commissioner, which is
8 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
9 action for judicial review on March 28, 2018. ECF No. 1.

10 **STATEMENT OF FACTS**

11 Plaintiff was born on August 29, 1958, and was 55 years old on the alleged
12 onset date, January 17, 2014. Tr. 58, 175. He completed high school and two
13 years of college. Tr. 62, 186. He spent six years in the Navy and had worked
14 more than 20 years in a naval shipyard as a health physicist instructor. Tr. 62-63,
15 186. Plaintiff's disability report indicates he stopped working on January 17, 2014,
16 because of his conditions. Tr. 185. He testified at the administrative hearing he
17 was unable to work due to symptoms caused by his toxic mold syndrome. Tr. 64.
18 Plaintiff described the symptoms as his eyes rolling into his head and migraine
19 headaches triggered by attempting to recall a long-term memory, physical activity,
20 viewing flashing lights, and exposure to mold. Tr. 64-65. He has treated the
21 condition with icepacks for his head, aspirin, saunas to release toxins, and
22 avoidance of mold. Tr. 65-68.

23 Plaintiff testified that a typical day consisted of working on his house to get
24 it ready to sell (he was planning a move to Washington State to live in a drier
25 climate, Tr. 59), some reading, watching television, and playing a computer game.
26 Tr. 68-69. He also indicated he was able to help with household chores by doing
27 some cooking. Tr. 69. Plaintiff stated he was no longer able to drive due to his
28 condition. Tr. 69.

1 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
2 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
3 to step five, and the burden shifts to the Commissioner to show that (1) the
4 claimant can make an adjustment to other work; and (2) the claimant can perform
5 specific jobs which exist in significant numbers in the national economy. *Batson v.*
6 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a
7 claimant cannot make an adjustment to other work in the national economy, a
8 finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 **ADMINISTRATIVE DECISION**

10 On January 25, 2017, the ALJ issued a decision finding Plaintiff was not
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
13 activity since January 17, 2014, the alleged onset date. Tr. 14.

14 At step two, the ALJ determined Plaintiff had the following medically
15 determinable impairments: toxic mold allergy, headaches, vision issues, obesity
16 and hypertension. Tr. 14. However, the ALJ found Plaintiff did not have a severe
17 impairment or combination of impairments. Tr. 15-18.

18 The ALJ thus concluded at step two of the sequential evaluation process that
19 Plaintiff was not under a disability within the meaning of the Social Security Act at
20 any time from January 17, 2014, the alleged onset date, through January 25, 2017,
21 the date of the ALJ’s decision. Tr. 21.

22 **ISSUES**

23 The question presented is whether substantial evidence supports the ALJ’s
24 decision denying benefits and, if so, whether that decision is based on proper legal
25 standards.

26 Plaintiff alleges the following assignments of error: (1) the ALJ’s decision
27 is not supported by substantial evidence; (2) the ALJ committed legal error when
28 she determined Plaintiff did not have a severe impairment at step two of the

1 sequential evaluation; and (3) the ALJ failed to give the appropriate consideration
2 to the symptom testimony of Plaintiff and the opinion of Plaintiff’s treating and
3 examining doctors. ECF No. 12 at 1.

4 DISCUSSION¹

5 A. Step Two

6 Plaintiff argues the ALJ erred by determining Plaintiff did not have a severe
7 medically determinable impairment. ECF No. 12 at 8-9. The Court agrees.

8 Plaintiff has the burden of proving he has a severe impairment at step two of
9 the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.912.
10 To meet this burden, Plaintiff must furnish medical and other evidence showing he
11 has a severe impairment. 20 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§
12 404.1520(c), 416.920(c), provide that an impairment is severe if it significantly
13 limits one’s ability to perform basic work activities. An impairment is considered
14 non-severe if it “does not significantly limit your physical or mental ability to do
15 basic work activities.” 20 C.F.R. §§ 404.1521, 416.921. “Basic work activities”
16 are defined as the abilities and aptitudes necessary to do most jobs. See 20 C.F.R.
17 §§ 404.1521(b), 416.921(b).

18 Step two is “a de minimis screening device [applied] to dispose of
19 groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An
20 ALJ may find a claimant lacks a medically severe impairment or combination of

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22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are “Officers of the United
24 States” and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant’s opening brief).

1 impairments only when this conclusion is “clearly established by medical
2 evidence.” S.S.R. 85-28 (1985); *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th
3 Cir. 2005). In reviewing the claimed error, the Court must consider whether the
4 record includes evidence of a severe impairment and, if so, whether the ALJ’s
5 response to that evidence was legally correct.

6 In this case, the ALJ evaluated the evidence of record, considered the
7 hearing testimony, and concluded Plaintiff did not have a severe impairment
8 related to his allegations of toxic mold syndrome, allergic rhinitis, allergic
9 conjunctivitis, migraine headaches, brain fog, light sensitivity, eyes rolling into
10 head, joint pain and muscle pain. Tr. 15-18. The ALJ indicated Plaintiff’s
11 hypertension appeared to be fairly well controlled with medication, Tr. 16; there
12 was no evidence Plaintiff’s obesity resulted in an exacerbation of his co-existing
13 medical problems, Tr. 16; the evidence of record failed to show Plaintiff sought
14 aggressive treatment or other solutions for his alleged significant symptoms from
15 his toxic mold and other allergies, Tr. 16; the record failed to demonstrate
16 Plaintiff’s headaches were of such severity to cause him to seek frequent medical
17 or emergency room treatment or to have been prescribed headache medications, Tr.
18 16-17; Plaintiff’s vision complaints were unsubstantiated by objective evidence,
19 Tr. 17; and Plaintiff’s mental health allegations were inconsistent with his
20 essentially normal mental examinations, prior denials of experiencing depression
21 and anxiety, and lack of psychiatric hospitalizations, psychotherapy or being
22 prescribed psychotropic medications, Tr. 17-18.

23 The Court agrees, and Plaintiff did not specifically contest in his briefing,
24 see *Carmickle*, 533 F.3d at 1161 n.2, that the medical evidence of record fails to
25 document Plaintiff’s mental health concerns, hypertension and obesity have
26 resulted in significant limitations. Accordingly, the Court will not disturb the
27 ALJ’s determination that these medically determinable impairments are not severe.
28 However, with respect to Plaintiff’s toxic mold syndrome, and resultant headaches

1 and vision issues, the Court finds the record is replete with evidence sufficient to
2 pass the de minimis threshold of step two of the sequential evaluation process. See
3 Smolen, 80 F.3d at 1290. As argued by Plaintiff, and discussed below, every
4 treating and examining medical source in the record notes Plaintiff's toxic mold
5 syndrome has had more than a minimal effect on his ability to work. See *infra*.

6 In a disability proceeding, the courts distinguish among the opinions of three
7 types of acceptable medical sources: physicians who treat, physicians who
8 examine but do not treat the claimant and those who neither examine nor treat the
9 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). A treating
10 physician's opinion carries more weight than an examining physician's opinion,
11 and an examining physician's opinion is given more weight than that of a
12 nonexamining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
13 *Lester*, 81 F.3d at 830. The Ninth Circuit has held that "[t]he opinion of a
14 nonexamining physician cannot by itself constitute substantial evidence that
15 justifies the rejection of the opinion of either an examining physician or a treating
16 physician." *Lester*, 81 F.3d at 830; *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th
17 Cir. 1990) (finding a nonexamining doctor's opinion "with nothing more" does not
18 constitute substantial evidence).

19 Plaintiff's primary treating source, David S. Hurst, M.D., Ph.D., wrote a
20 letter on December 27, 2013, which summarized earlier neurologist and
21 psychological evaluations. Tr. 336-337. Dr. Hurst stated his opinion that there
22 was no pathologic or psychiatric diagnosis to explain Plaintiff's symptoms other
23 than a toxic reaction to mold exposure. Tr. 336. On February 19, 2014, Dr. Hurst
24 wrote that continual exposure to molds had worsened Plaintiff's symptoms. Tr.
25 333. He opined that Plaintiff was severely allergic to mold and should not
26 continue to work unless he could be assured of a totally mold-free work
27 environment. Tr. 333. Dr. Hurst wrote a letter on April 25, 2014, and indicated
28 Plaintiff would be medically disabled as long as he was exposed to the damp wet

1 mold environment of Maine. Tr. 330. On May 20, 2014, Dr. Hurst detailed
2 Plaintiff's struggles with toxic mold syndrome. Tr. 327-328. He noted they had
3 documented Plaintiff's mold sensitivity by intradermal testing and determined
4 Plaintiff was "unequivocally sensitive to a multitude of various molds that are
5 found throughout the environment." Tr. 327. Dr. Hurst opined that Plaintiff's
6 continued work exposure to mold "precipitated his symptoms to the point that he
7 became . . . totally disabled." Tr. 327.

8 On March 24, 2014, Colin R. Robinson, O.D., F.A.A.O, completed a neuro-
9 optometric examination and assessed "extreme photophobia." Tr. 291-292. Dr.
10 Robinson noted Plaintiff had a history of daily migraine-type headaches, frequent
11 symptoms of both eyes rolling up, and extreme light sensitivity. Tr. 291.

12 Examining physician Thomas F. Johnson, M.D., evaluated Plaintiff on May
13 11, 2016. Tr. 369-374. Dr. Johnson noted Plaintiff was evaluated by an ear, nose
14 and throat specialist in 2012 using the Rinkler intradermal dilutional technique and
15 was found to have evidence of sensitivity to molds. Tr. 370. Plaintiff's symptoms
16 worsened with continual exposure to molds. Tr. 370. Dr. Johnson opined Plaintiff
17 had a very complex neurologic abnormality and the neurologic abnormality was
18 due to his toxic mold exposure and continued exposure to molds to which he was
19 sensitive. Tr. 372. He further opined that Plaintiff was in an almost continuous
20 state of repetitive migraine headaches. Tr. 372. Dr. Johnson concluded Plaintiff
21 was unable to work any job because his sensitivity to mold induced photophobia,
22 blepharospasm, migraine and oculogyric crises (described as forced closure of his
23 eyes with his eyeballs rolling upward). Tr. 372, 374.

24 A consultative physical examination was completed by Richard Stockwell,
25 D.O., on June 27, 2016. Tr. 376-385. Dr. Stockwell was unable to evaluate
26 Plaintiff's eyes because Plaintiff was not able to open his eyes during the exam.
27 Tr. 377. Dr. Stockwell specifically indicated he was "not familiar with mold
28 toxicity" and would defer to "a specialist who is well versed in this kind of

1 problem, either neurology or allergy/immunology.” Tr. 377. Nevertheless, Dr.
2 Stockwell stated he was unable to see any deficits that would preclude Plaintiff
3 from performing basic activities. Tr. 377.

4 While the ALJ provided various reasons for according little or no weight to
5 the treating and examining medical professionals noted above, including finding
6 their opinions were unsupported, based primarily on Plaintiff’s subjective
7 complaints, and inconsistent with Plaintiff’s demonstrated activities of daily living,
8 Tr. 19-21, the Court finds the ALJ’s rationale lacked specificity. See *Brown-*
9 *Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (finding a clear statement of
10 the agency’s reasoning is necessary because the Court can affirm the ALJ’s
11 decision to deny benefits only on the grounds invoked by the ALJ). “Although the
12 ALJ’s analysis need not be extensive, the ALJ must provide some reasoning in
13 order for us to meaningfully determine whether the ALJ’s conclusions were
14 supported by substantial evidence.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775
15 F.3d 1090, 1103 (9th Cir. 2014). The Court finds the ALJ’s analysis with respect
16 to Plaintiff’s treating and examining medical sources failed to specifically identify
17 and explain legitimate bases for rejecting or discounting their opinions. See
18 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

19 The ALJ relied exclusively on nonexamining medical opinions² to find
20 Plaintiff’s complaints of toxic mold allergy, with symptoms including headaches,
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22 ²Margaret Pollock, M.D., testified at the April 14, 2016, administrative
23 hearing. Tr. 40-57. Dr. Pollock specifically indicated toxic mold allergy was not
24 her area of expertise (she is a neurologist), Tr. 42, and the underlying issue in this
25 case is usually treated by someone like an immunologist, Tr. 49. Dr. Pollack also
26 stated Plaintiff “should have had a more extensive evaluation and treatment for
27 these various symptoms that he’s describing.” Tr. 46, 55-56. Nevertheless, Dr.
28 Pollack opined the record reflected Plaintiff had no medically determinable

1 memory loss, pain and light sensitivity, was not a severe impairment. Tr. 18. As
2 indicated above, the opinion of a nonexamining physician cannot alone constitute
3 substantial evidence that justifies the rejection of the opinion of a treating
4 physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

5 Moreover, both examiner Stockwell, Tr. 377, and medical expert Pollack,
6 Tr. 49, expressed unfamiliarity with mold toxicity and suggested the medical issue
7 would be better addressed by an immunologist. Therefore, at a minimum, the
8 medical evidence was sufficiently ambiguous with regard to Plaintiff's toxic mold
9 syndrome to trigger the ALJ's duty to fully and fairly develop the record. See
10 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) ("In Social Security cases the
11 ALJ has a special duty to fully and fairly develop the record and to assure that the
12 claimant's interests are considered."). In any event, the Court finds the medical
13 records outlined above demonstrate problems with Plaintiff's sensitivity to mold to
14 pass the de minimis threshold of step two of the sequential evaluation process. See
15 *Smolen*, 80 F.3d at 1290.

16 Based on the foregoing, the Court finds the ALJ erred at step two of the
17 sequential evaluation process. Accordingly, this matter must be remanded for
18 additional proceedings in order for the ALJ to take into consideration Plaintiff's
19 toxic mold syndrome, with symptoms including headaches, memory loss, pain and
20 light sensitivity, and the limitations those symptoms have on Plaintiff's
21 functionality. Although the Court finds that the ALJ erred at step two, it is not

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25 impairments. Tr. 42, 43. The ALJ accorded Dr. Pollack's opinion "great weight."
26 Tr. 18. The ALJ also gave "great weight" to state agency reviewing physicians
27 Donald Trumbull, M.D., Tr. 92, and Benjamin Weinberg, M.D., Tr. 103, who each
28 concluded Plaintiff had no severe physical impairments. Tr. 21.

1 clear from the record, as it currently stands, whether Plaintiff's severe
2 impairments, either singly or in combination, would prevent him from performing
3 substantial gainful employment. Further development is necessary for a proper
4 determination.

5 **B. Plaintiff's Subjective Complaints**

6 Plaintiff also contends the ALJ erred by improperly rejecting his subjective
7 complaints. ECF No. 12 at 14-17.

8 It is the province of the ALJ to make credibility determinations. Andrews,
9 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
10 cogent reasons. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Once
11 the claimant produces medical evidence of an underlying medical impairment, the
12 ALJ may not discredit testimony as to the severity of an impairment because it is
13 unsupported by medical evidence. Reddick, 157 F.3d 715, 722 (9th Cir. 1998).
14 Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the
15 claimant's testimony must be "specific, clear and convincing." Smolen, 80 F.3d at
16 1281; Lester, 81 F.3d at 834. "General findings are insufficient: rather the ALJ
17 must identify what testimony is not credible and what evidence undermines the
18 claimant's complaints." Lester, 81 F.3d at 834; Dodrill v. Shalala, 12 F.3d 915,
19 918 (9th Cir. 1993).

20 Contrary to Defendant's contentions, ECF No. 13 at 18, the ALJ did not
21 make a specific finding of malingering in this case. Instead, the ALJ advanced the
22 following reasons for finding Plaintiff's subjective complaints not persuasive: (1)
23 the objective medical evidence did not support the level of impairment claimed; (2)
24 Plaintiff did not seek more aggressive treatment for his alleged disabling
25 impairments; (3) Plaintiff failed to cooperate during the consultative examination
26 with Dr. Stockwell; (4) Plaintiff's activities of daily living were inconsistent with
27 his allegations of disabling functional limitations; and (5) Plaintiff made a

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1 statement in 2013 (prior to the alleged onset date) which raised concerns about
2 possible secondary gain motivation by Plaintiff. Tr. 16-19.

3 While some of the reasons provided by the ALJ for discounting Plaintiff's
4 testimony may be supported by the evidence of record, this matter must be
5 remanded for additional proceedings in light of the ALJ's erroneous determination
6 at step two of the sequential evaluation process. See supra. Accordingly, on
7 remand, the ALJ shall also reconsider Plaintiff's statements and testimony and
8 reassess what statements, if any, are not credible and, if deemed not credible, what
9 specific evidence undermines those statements.

10 **C. Medical Opinion Evidence**

11 Plaintiff additionally contends the ALJ erred by rejecting various medical
12 sources in this case. ECF No. 12 at 9-14.

13 As determined above, the ALJ erred at step two; therefore, this matter must
14 be remanded for additional proceedings. As discussed, the ALJ erred by providing
15 inadequate rationale for rejecting or discounting the opinions of Plaintiff's treating
16 and examining medical professionals. See supra. Consequently, the ALJ's RFC
17 determination is not supported and must be reevaluated.

18 On remand, the ALJ shall reassess the medical opinions of Drs. Hurst,
19 Robinson, Johnson, and Stockwell, as well as all other medical evidence of record
20 relevant to Plaintiff's claim for disability benefits. Furthermore, the ALJ shall
21 direct Plaintiff to undergo a new consultative physical examination with particular
22 emphasis on Plaintiff's toxic mold syndrome. If warranted, the ALJ shall
23 additionally elicit the testimony of a medical expert at a new administrative
24 hearing to further assist the ALJ in formulating a RFC determination. The ALJ
25 shall then make determinations at the remaining steps of the sequential evaluation
26 process.

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1 **CONCLUSION**

2 Plaintiff argues the ALJ’s decision should be reversed and remanded for the
3 payment of benefits. The Court has the discretion to remand the case for additional
4 evidence and findings or to award benefits. Smolen, 80 F.3d at 1292. The Court
5 may award benefits if the record is fully developed and further administrative
6 proceedings would serve no useful purpose. Id. Remand is appropriate when
7 additional administrative proceedings could remedy defects. Rodriguez v. Bowen,
8 876 F.2d 759, 763 (9th Cir. 1989). It is clear further development is necessary.

9 On remand, the ALJ shall reexamine the severity of Plaintiff’s physical
10 condition at step two of the sequential evaluation process. The ALJ shall
11 reconsider the opinions of Drs. Hurst, Robinson, Johnson, and Stockwell, and all
12 other medical evidence of record. The ALJ shall further develop the record by
13 directing Plaintiff to undergo a consultative examination, preferably with an
14 individual who specializes in treating or examining people with allergies; i.e, an
15 immunologist, with particular emphasis on Plaintiff’s toxic mold syndrome. If
16 warranted, the ALJ shall also elicit the testimony of a medical expert at a new
17 administrative hearing to further assist the ALJ in formulating a RFC
18 determination. The ALJ shall also reevaluate Plaintiff’s statements and testimony,
19 obtain supplemental testimony from a vocational expert, if necessary, and take into
20 consideration any other evidence or testimony relevant to Plaintiff’s disability
21 claim.

22 **IT IS ORDERED:**

23 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is
24 **GRANTED IN PART.**

25 2. Defendant’s Motion for Summary Judgment, **ECF No. 13**, is
26 **DENIED.**

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