

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

Nov 12, 2019

SEAN F. MCAVOY, CLERK

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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
8

9 TIMOTHY D.,

No. 2:18-CV-00304-JTR

10 Plaintiff,

11 v.

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

12  
13 ANDREW M. SAUL,  
14 COMMISSIONER OF SOCIAL  
15 SECURITY,<sup>1</sup>

16 Defendant.  
17

18 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
19 No. 14, 15. Attorney Dana Chris Madsen represents Timothy D. (Plaintiff);  
20 Special Assistant United States Attorney Jeffrey R. McClain represents the  
21 Commissioner of Social Security (Defendant). The parties have consented to  
22 proceed before a magistrate judge. ECF No. 4. After reviewing the administrative  
23 record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion  
24 for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

25 <sup>1</sup> Andrew M. Saul is now the Commissioner of the Social Security  
26 Administration. Accordingly, the Court substitutes Andrew M. Saul as the  
27 Defendant and directs the Clerk to update the docket sheet. See Fed. R. Civ. P.  
28 25(d).

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 **JURISDICTION**

2 Plaintiff filed an application for Disability Insurance Benefits on December  
3 31, 2015, alleging disability since May 29, 2010,<sup>2</sup> due to PTSD, major depressive  
4 disorder, adjustment disorder, acute social anxiety disorder, ADHD, COPD,  
5 umbilical hernia, tinnitus, left hand cramping, and difficulties with balance. Tr.  
6 146-47. The application was denied initially and upon reconsideration. Tr. 191-  
7 93, 195-96. Administrative Law Judge (ALJ) Marie Palachuk held a hearing on  
8 May 24, 2017, Tr. 89-119, and issued an unfavorable decision on September 26,  
9 2017, Tr. 16-32. Plaintiff requested review from the Appeals Council. Tr. 259,  
10 349-54. The Appeals Council denied the request for review on July 30, 2018. Tr.  
11 1-6. The ALJ's September 2017 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 September 27, 2018. ECF  
14 No. 1, 5.

15 **STATEMENT OF FACTS**

16 Plaintiff was born in 1958 and was 57 years old as of his date last insured in  
17 2015. Tr. 30. He has a high school diploma and an associate's degree in  
18 electronics from Spokane Community College. Tr. 101, 375. He worked for many  
19 years as an ATM repairman. Tr. 103, 385, 515. In 2010, he was dismissed from  
20 his job due to errors. Id. He reported an inability to continue working due to  
21 declining cognitive abilities. Tr. 386, 397, 407, 536. He applied for disability in  
22 2011 and was denied by an ALJ in 2013. Tr. 123. He testified that since his prior  
23 application, his balance had gotten worse, and he continued to be limited by  
24 breathing problems, headaches, abdominal pain, hand cramping, and mental health  
25 difficulties. Tr. 103-09.

26 \_\_\_\_\_  
27 <sup>2</sup> Plaintiff later amended his alleged onset date to December 7, 2013, due to  
28 a prior unfavorable decision. Tr. 92.

1 **STANDARD OF REVIEW**

2 The ALJ is responsible for determining credibility, resolving conflicts in  
3 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
4 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed de novo, with  
5 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
6 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
7 only if it is not supported by substantial evidence or if it is based on legal error.  
8 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
9 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
10 1098. Put another way, substantial evidence is such relevant evidence as a  
11 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
12 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
13 rational interpretation, the Court may not substitute its judgment for that of the  
14 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
15 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
16 administrative findings, or if conflicting evidence supports a finding of either  
17 disability or non-disability, the ALJ’s determination is conclusive. *Sprague v.*  
18 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
19 supported by substantial evidence will be set aside if the proper legal standards  
20 were not applied in weighing the evidence and making the decision. *Brawner v.*  
21 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Commissioner has established a five-step sequential evaluation process  
24 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*  
25 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
26 proof rests upon the claimant to establish a prima facie case of entitlement to  
27 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a  
28 claimant establishes that a physical or mental impairment prevents the claimant

1 from engaging in past relevant work. 20 C.F.R. § 404.1520(a)(4). If a claimant  
2 cannot perform past relevant work, the ALJ proceeds to step five, and the burden  
3 shifts to the Commissioner to show (1) the claimant can make an adjustment to  
4 other work; and (2) the claimant can perform specific jobs that exist in the national  
5 economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th  
6 Cir. 2004). If a claimant cannot make an adjustment to other work in the national  
7 economy, the claimant will be found disabled. 20 C.F.R. § 404.1520(a)(4)(v).

### 8 **ADMINISTRATIVE DECISION**

9 On September 26, 2017, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
12 activity from the alleged onset date through the date last insured of December 31,  
13 2015. Tr. 19.

14 At step two, the ALJ determined Plaintiff had the following severe  
15 impairments: major depressive disorder, generalized anxiety disorder, personality  
16 disorder, attention deficit hyperactive disorder, history of umbilical hernia, and  
17 mild obesity. *Id.*

18 At step three, the ALJ found Plaintiff did not have an impairment or  
19 combination of impairments that met or medically equaled the severity of one of  
20 the listed impairments. Tr. 19-23.

21 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and found  
22 he could perform work at the medium exertional level, with the following specific  
23 limitations:

24 the claimant would be limited to occasional pushing and pulling with  
25 the left upper extremity, climbing of ladders, ropes, and scaffolds, and  
26 handling and fingering with the left non-dominant hand. The claimant  
27 could frequently balance, stoop, kneel, crouch, and crawl. The  
28 claimant would be able to understand, remember, and carryout both  
simple routine tasks and semiskilled tasks and could maintain

1 attention and concentration for two hour intervals between regularly  
2 scheduled breaks throughout a regularly scheduled workday and  
3 workweek. The claimant should have no public interaction and only  
4 superficial interaction with co-workers (i.e. non-collaborative and no  
5 tandem tasks). The claimant should be working independently,  
6 working with things rather than people, and should not have to be in  
7 crowds.

8 Tr. 23.

9 At step four, the ALJ found Plaintiff was unable to perform his past relevant  
10 work as an automatic teller machine servicer. Tr. 30.

11 At step five, the ALJ determined that, based on the testimony of the  
12 vocational expert, and considering Plaintiff's age, education, work experience, and  
13 RFC, there were jobs that existed in significant numbers in the national economy  
14 that Plaintiff was capable of performing, including the jobs of industrial cleaner  
15 and merchant patroller. Tr. 30-31.

16 The ALJ thus concluded Plaintiff was not under a disability within the  
17 meaning of the Social Security Act at any time from the alleged onset date through  
18 the date last insured of December 31, 2015. Tr. 32.

## 19 ISSUES

20 The question presented is whether substantial evidence supports the ALJ's  
21 decision denying benefits and, if so, whether that decision is based on proper legal  
22 standards.

23 Plaintiff contends the ALJ erred by (1) improperly discrediting Plaintiff's  
24 symptom testimony; and (2) improperly evaluating the medical opinion evidence.

## 25 DISCUSSION

### 26 1. Plaintiff's symptom statements

27 Plaintiff alleges the ALJ erred in rejecting his symptom testimony without  
28 providing adequate reasons. ECF No. 14 at 14-15. Specifically, Plaintiff argues  
the ALJ improperly discounted his testimony because of his daily activities, which

1 did not indicate an ability to work and were not inconsistent with his claims of  
2 disability. *Id.*

3 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
4 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
5 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
6 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
7 rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen*  
8 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834  
9 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify  
10 what testimony is not credible and what evidence undermines the claimant's  
11 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.  
12 1993).

13 The ALJ found Plaintiff's medically determinable impairments could  
14 reasonably be expected to produce the alleged symptoms; however, she found  
15 Plaintiff's statements concerning the intensity, persistence and limiting effects of  
16 his symptoms to not be entirely consistent with the medical evidence and other  
17 evidence in the record. Tr. 25. The ALJ found the objective medical evidence did  
18 not fully support the level of physical and mental limitation claimed, and noted  
19 Plaintiff's refusal to follow doctor-recommended treatment. Tr. 25-28.

20 Unexplained or inadequately explained reasons for failing to seek medical  
21 treatment or follow treatment recommendations can cast doubt on a claimant's  
22 subjective complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The  
23 ALJ noted that Plaintiff "consistently refused medications to treat his depression  
24 and failed to follow through with several referrals for counseling." Tr. 28. The  
25 record reflects a number of instances where Plaintiff declined medications (Tr.  
26 441, 452, 454), took himself off medications (Tr. 484), declined physical therapy  
27 (Tr. 454), and failed to follow through with referrals to other providers (Tr. 460,  
28 525). While the record occasionally reflects Plaintiff's belief that various

1 treatments would not help or had not been helpful in the past (Tr. 112, 417, 434,  
2 437, 475), it also indicates providers' opinions that engagement in treatment and  
3 medication management would help reduce symptoms (Tr. 305, 436, 446, 457,  
4 519, 542), along with Plaintiff's own reports that treatment did reduce symptoms at  
5 times (Tr. 111-12, 408, 416, 433, 441, 444, 485, 488, 516, 525, 537).

6 Plaintiff did not address the ALJ's stated rationale in his opening brief. ECF  
7 No. 14 at 14-15. He argues for the first time in his reply brief that the record does  
8 not reflect a refusal of treatment recommendations, but rather his discussion of side  
9 effects of medications and his belief that physical therapy would not help, and that  
10 he eventually accepted the referral at a later visit. ECF No. 16 at 3-4 (citing Tr.  
11 454, 457). Plaintiff simply offers an alternative interpretation of the record. The  
12 ALJ's interpretation of the record is also reasonable. "If the evidence can  
13 reasonably support either affirming or reversing a decision, we may not substitute  
14 our judgment for that of the Commissioner." *Lingenfelter v. Astrue*, 504 F.3d  
15 1028, 1035 (9th Cir. 2007).

16 Although it cannot serve as the sole ground for rejecting a claimant's  
17 symptom statements, objective medical evidence is a "relevant factor in  
18 determining the severity of the claimant's pain and its disabling effects." *Rollins v.*  
19 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ appropriately considered  
20 the lack of supporting objective evidence in the file, in considering the severity of  
21 both Plaintiff's mental and physical impairments. Tr. 25-28. The ALJ's  
22 interpretation of the record is supported by substantial evidence.

## 23 **2. Opinion evidence**

24 Plaintiff alleges the ALJ improperly weighed the opinion evidence. ECF  
25 No. 14 at 15-18. Specifically, he alleges the ALJ did not afford enough weight to  
26 the opinions from Drs. Islam-Zwart and Genthe, giving undue weight to non-  
27 treating doctors' opinions over those of the examining sources. Plaintiff also  
28 argues the ALJ failed to consider parts of the non-examining doctors' opinions. *Id.*

1 a. Examining doctors Islam-Zwart and Genthe

2 Plaintiff argues the ALJ gave insufficient reasons for rejecting the opinions  
3 from the examining doctors, Dr. Islam-Zwart and Dr. Genthe, and improperly  
4 relied on the non-examining opinions instead. ECF No. 14 at 16-18.<sup>3</sup>

5 When an examining physician’s opinion is contradicted by another  
6 physician, the ALJ is required to provide “specific and legitimate reasons” to reject  
7 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific  
8 and legitimate standard can be met by the ALJ setting out a detailed and thorough  
9 summary of the facts and conflicting clinical evidence, stating his interpretation  
10 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
11 1989).

12 Plaintiff underwent multiple psychological exams with doctors from the  
13 Washington Department of Social and Health Services. In 2015, he was examined  
14 by Dr. Islam-Zwart, who concluded his diagnoses included major depressive  
15 disorder, PTSD, ADHD, and personality disorder. Tr. 410. She opined he had  
16 numerous moderate and marked limitations in his functional abilities, and that his  
17 “presentation is such that he is unable to work at this time and his prognosis for the  
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19 <sup>3</sup> Plaintiff also asserts in passing that the ALJ improperly discounted the  
20 findings of Dr. Debra Brown and Dr. John Arnold by relying on the nonexamining  
21 sources. Tr. 18. Plaintiff has failed to identify any specific error on the part of the  
22 ALJ with respect to these opinions. The Court will not “manufacture arguments  
23 for an appellant” and therefore will not consider claims that were not actually  
24 argued in the opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977  
25 (9th Cir. 1994). The Court notes that the opinions from Dr. Brown and Dr. Arnold  
26 are not discussed in the ALJ’s decision, and pre-date the relevant period in this  
27 claim. Tr. 375-82 (Dr. Arnold’s 2011 opinion); Tr. 396-401 (Dr. Brown’s April  
28 2013 opinion).



1 future seems poor.” Tr. 405, 411. In 2016, Plaintiff was examined by Dr. Genthe,  
2 who offered similar diagnoses and rated Plaintiff’s work-related functional abilities  
3 as mild to moderately impaired. Tr. 517-18.

4 The ALJ assigned little weight to each of these opinions, noting them to be  
5 one-time exams, inconsistent with the longitudinal record, and contradicted by Dr.  
6 Winfrey, the medical expert at the hearing. Tr. 28-29. The ALJ also noted Dr.  
7 Genthe’s remark that Plaintiff may have exaggerated the severity of his symptoms.  
8 Tr. 29.

9 Plaintiff argues the ALJ improperly rejected the opinions, and asserts  
10 Plaintiff’s performance on exam would be a factor each of the examining doctors  
11 would have considered. ECF No. 14 at 16-17. Plaintiff fails to address the ALJ’s  
12 other stated rationales. The consistency of a medical opinion with the record as a  
13 whole is a relevant factor for an ALJ to consider. 20 C.F.R. § 404.1527(c)(4). The  
14 ALJ found the consultative exams to be unsupported by the longitudinal evidence,  
15 offering a summary of the available records and identifying conflicting findings.  
16 Furthermore, while the opinion of “a nonexamining physician cannot by itself  
17 constitute substantial evidence that justifies the rejection of the opinion [of] an  
18 examining physician,” Lester, 81 F.3d at 831, it can be a factor in the ALJ’s  
19 rationale. Morgan v. Comm’r of Social Sec. Admin, 169 F.3d 595, 602 (9th Cir.  
20 1999). A non-examining physician’s opinion may amount to substantial evidence  
21 as long as it is consistent with other independent evidence in the record.  
22 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). The ALJ relied on Dr.  
23 Winfrey’s opinion, which was based on a review of the entire record, including Dr.  
24 Islam-Zwart and Dr. Genthe’s opinions.

25 Because the ALJ offered specific and legitimate reasons for disregarding the  
26 opinions of the examining doctors, the Court finds no error.

27 b. State agency opinions  
28

1 Plaintiff argues the ALJ's discussion of the state agency opinions fails to  
2 consider the portion that indicated Plaintiff was limited to occasional use of his left  
3 upper extremity. ECF No. 14 at 18. As Defendant points out, the ALJ  
4 incorporated the recommended limitations in the RFC. Tr. 23, 153-54, 168-69. As  
5 the ALJ adopted all assessed limitations, any failure to include the limits in her  
6 summary of the opinions is irrelevant. There is no error.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court finds the  
9 ALJ's decision should be affirmed. Therefore, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is  
11 **GRANTED.**

12 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

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

16 **IT IS SO ORDERED.**

17 DATED November 12, 2019.



A handwritten signature in black ink, appearing to read "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE