

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

Mar 30, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRANDON C.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 2:19-CV-00027-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 16. Attorney Dana Chris Madsen represents Brandon C. (Plaintiff); Special Assistant United States Attorney Justin Lane Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 **JURISDICTION**

2 Plaintiff filed an application for Supplemental Security Income on August
3 23, 2016, alleging disability since birth,² due to persisting depressive disorder,
4 anxiety disorder, autism spectrum, and passive-dependent personality features. Tr.
5 66. The application was denied initially and upon reconsideration. Tr. 89-92, 96-
6 98. Administrative Law Judge (ALJ) R.J. Payne held a hearing on October 27,
7 2017, Tr. 33-65, and issued an unfavorable decision on February 20, 2018, Tr. 15-
8 27. Plaintiff requested review from the Appeals Council, and the Appeals Council
9 denied the request on November 26, 2018. Tr. 1-6. The ALJ’s February 2018
10 decision became the final decision of the Commissioner, which is appealable to the
11 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
12 review on January 18, 2019. ECF No. 1.

13 **STATEMENT OF FACTS**

14 Plaintiff was born in 1989 and was 26 years old as of the filing of his
15 application. Tr. 27. He completed high school, with special education services,
16 and has no work history. Tr. 44, 251. He lives with his mother and spends most of
17 his time in his bedroom, drawing, reading comics, and playing video games. Tr.
18 50, 244-45, 251. He testified he has anxiety about leaving his bedroom. Tr. 50-51.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed de novo, with
23 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
24 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
25 only if it is not supported by substantial evidence or if it is based on legal error.

26 _____
27 ²Plaintiff later amended his alleged onset date to the date of the filing of his
28 application. Tr. 35.

1 Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
2 defined as being more than a mere scintilla, but less than a preponderance. Id. at
3 1098. Put another way, substantial evidence is such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion. Richardson v.
5 Perales, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
6 rational interpretation, the Court may not substitute its judgment for that of the
7 ALJ. Tackett, 180 F.3d at 1097; Morgan v. Commissioner of Social Sec. Admin.,
8 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
9 administrative findings, or if conflicting evidence supports a finding of either
10 disability or non-disability, the ALJ's determination is conclusive. Sprague v.
11 Bowen, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
12 supported by substantial evidence will be set aside if the proper legal standards
13 were not applied in weighing the evidence and making the decision. Brawner v.
14 Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); Bowen v.
18 Yuckert, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
19 proof rests upon the claimant to establish a prima facie case of entitlement to
20 disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is met once a
21 claimant establishes that a physical or mental impairment prevents the claimant
22 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
23 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
24 shifts to the Commissioner to show (1) the claimant can make an adjustment to
25 other work; and (2) the claimant can perform specific jobs that exist in the national
26 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th
27 Cir. 2004). If a claimant cannot make an adjustment to other work in the national
28 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

1 in the national economy, including the jobs of hand packager, small products
2 assembler, and electronics worker. Tr. 26-27.

3 The ALJ thus concluded Plaintiff was not under a disability within the
4 meaning of the Social Security Act at any time from August 23, 2016, the
5 application date, through February 20, 2018, the day of the decision. Tr. 26.

6 ISSUES

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

10 Plaintiff contends the ALJ erred by (1) improperly rejecting Plaintiff's
11 symptom testimony; and (2) improperly evaluating the medical opinion evidence.

12 DISCUSSION

13 1. Plaintiff's symptom statements

14 Plaintiff alleges the ALJ erred in rejecting his symptom testimony without
15 providing adequate reasons. ECF No. 15 at 14-17.

16 It is the province of the ALJ to make credibility determinations. *Andrews v.*
17 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
18 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
19 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for
20 rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen*
21 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
22 (9th Cir. 1995).

23 The ALJ found Plaintiff's medically determinable impairments could
24 reasonably be expected to produce the alleged symptoms; however, he found
25 Plaintiff's statements concerning the intensity, persistence and limiting effects of
26 his symptoms were not entirely consistent with the medical evidence and other
27 evidence in the record. Tr. 21. Specifically, the ALJ found Plaintiff's statements
28 to be inconsistent with the objective medical evidence and his activities of daily

1 living. Tr. 23. The ALJ also noted Plaintiff had received very little treatment for
2 his depression and anxiety and the medication he took provided significant
3 symptom relief. Id.

4 Plaintiff objects to the ALJ's use of his activities to undermine the reliability
5 of his reports and challenges the ALJ's finding of only mild impairment in
6 adapting and managing himself, arguing that the record documents minimal
7 activities and self-care and that Plaintiff rarely leaves his bedroom. ECF No. 15 at
8 14-16. Plaintiff further challenges the ALJ's use of the normal objective findings,
9 arguing they are not an accurate representation of his longitudinal functioning. Id.
10 at 16. Plaintiff finally asserts that his allegations are supported by the findings of
11 Dr. Lontz and Dr. Arnold. Id. 16-17.

12 a. Minimal Treatment

13 The ALJ found Plaintiff's allegations of disabling mental conditions to be
14 undermined by the fact that he had received very little treatment for his depression
15 and anxiety, noting he attended only one psychotherapy visit in May 2017 and was
16 not prescribed any medications for his mental condition until 2016. Tr. 23.
17 Unexplained or inadequately explained reasons for failing to seek medical
18 treatment can cast doubt on a claimant's subjective complaints. *Fair v. Bowen*,
19 885 F.2d 597, 603 (9th Cir. 1989). While Plaintiff reported his depression and
20 anxiety symptoms to his medical providers, he repeatedly declined referrals to
21 counseling. Tr. 257, 301. He attended one session of individual psychotherapy,
22 but did not return. Tr. 421, 417-18. The record contains no explanation for
23 Plaintiff's failure to seek treatment for his allegedly disabling conditions. The ALJ
24 reasonably relied on this factor in discounting Plaintiff's symptom reports.

25 b. Objective evidence

26 The ALJ found Plaintiff's statements about his symptoms were inconsistent
27 with the objective medical evidence, noting mental status evaluations routinely
28 showed normal mood and affect, and emphasizing providers' assessments that

1 Plaintiff's mental health and autism spectrum conditions have been described as
2 mild. Tr. 23. Although it cannot serve as the sole ground for rejecting a claimant's
3 symptom statements, objective medical evidence is a "relevant factor in
4 determining the severity of the claimant's pain and its disabling effects." Rollins v.
5 Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Plaintiff asserts the normal findings
6 cited by the ALJ are not an accurate portrayal of Plaintiff's condition, due to the
7 cycling nature of mental health conditions. ECF No. 15 at 16. However, Plaintiff
8 points to no evidence in support of this argument that the record shows cycling,
9 other than his reports. The record reflects almost entirely normal mental status
10 exams. Tr. 257, 261, 264-65, 295, 302, 306, 418. On only a few occasions did
11 providers document anything notable about Plaintiff's mood or affect. Tr. 245,
12 253, 291, 295, 302, 306, 418. The ALJ's interpretation of the record is supported
13 by substantial evidence.

14 c. Improvement with treatment

15 The ALJ found once Plaintiff started mental health medication in 2016, he
16 experienced significant symptom relief, in that he was coming out of his room
17 more and seemed happier on the medication. Tr. 23. While an ALJ may consider
18 the type and efficacy of treatment in assessing a claimant's reliability, the fact that
19 a person suffering from depression makes some improvement "does not mean that
20 the person's impairment[] no longer seriously affect[s] [his] ability to function in a
21 workplace." Holohan v. Massanari, 246 F.3d 1195, 1205 (9th Cir. 2001); see
22 also Ryan v. *Comm'r of Soc. Sec.*, 528 F.3d 1194, 1200-01 (9th Cir. 2008). While
23 the ALJ is correct that the record reflects improvement in Plaintiff's condition with
24 treatment, he continued to report symptoms of anxiety, isolation, sleep disturbance,
25 and generally remaining in his home. Tr. 250, 261, 294, 301, 305, 417, 421. In
26 April 2017 he reported he was not getting significant relief from his medication
27 anymore and felt his anxiety and depression were steadily worsening. Tr. 291.
28 The ALJ's discussion of improvement with medication cited to a single report of

1 improvement when Plaintiff had been on medication for only a few weeks. Tr. 250
2 (cited by ALJ as Ex. 2F, pg.1). The finding of improvement with medication does
3 not constitute substantial evidence to discount Plaintiff's reports of ongoing
4 difficulties.

5 However, because the ALJ provided other clear and convincing reasons for
6 discounting Plaintiff's allegations, any such error was harmless. *Batson v. Comm'r*
7 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming a credibility
8 finding where one of several reasons was unsupported by the record).

9 d. Daily activities

10 A claimant's daily activities may support an adverse credibility finding if the
11 activities contradict his other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
12 2007). The ALJ found Plaintiff's allegation that he rarely leaves his bedroom to be
13 inconsistent with his activities of daily living, noting he attended regular doctor's
14 appointments and was able to attend movies with his friends and go out to dinner
15 with his girlfriend. Tr. 23. The record does not reflect Plaintiff engaging in the
16 above activities on a regular basis. Plaintiff testified he leaves his home to go to a
17 restaurant or movie maybe one time per week. Tr. 50. He stated he goes grocery
18 shopping with his mother less than once a month. *Id.* The record similarly reflects
19 social outings to be rare, with Plaintiff's mother and girlfriend routinely reporting
20 he spends the vast majority of his time in his room. Tr. 245, 250-51, 301, 417,
21 421. The ALJ characterized Plaintiff's doctor visits as "regular," but the record
22 reflects no more than one or two appointments per month, with several stretches of
23 multiple months with no visits. The activities identified by the ALJ do not conflict
24 with Plaintiff's testimony that he rarely leaves his home.

25 However, because the ALJ provided other clear and convincing reasons for
26 discounting Plaintiff's allegations, any such error was harmless. See *Batson*, 359
27 F.3d at 1197.

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1 **2. Medical opinion evidence**

2 Plaintiff argues the ALJ improperly weighed the opinion evidence, giving
3 undue weight to the medical expert who testified at the hearing, despite her lack of
4 understanding of Plaintiff's condition and her endorsement of Plaintiff's need for a
5 companion animal. ECF No. 15 at 17-18. Plaintiff further asserts the fact that
6 Plaintiff was not provided vocational rehabilitation services is evidence that the
7 Department of Vocational Rehabilitation did not believe he could be trained or
8 rehabilitated. ECF No. 15 at 18.³

9 In weighing medical source opinions, the ALJ should distinguish between
10 three different types of physicians: (1) treating physicians, who actually treat the
11 claimant; (2) examining physicians, who examine but do not treat the claimant; and
12 (3) nonexamining physicians who neither treat nor examine the claimant. Lester,
13 81 F.3d at 830. The ALJ should generally give more weight to the opinion of a
14 treating physician than to the opinion of an examining physician, and more weight
15 to an examining source than a non-examining source. *Orn v. Astrue*, 495 F.3d 625,
16 631 (9th Cir. 2007). In evaluating the weight owed to opinions the ALJ should
17 consider the nature of the relationship, the supportability and consistency of the
18 opinion, any specialization of the source, and other factors, such as the

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21 ³Plaintiff makes vague allusions to Dr. Lontz's and Dr. Arnold's opinions as
22 supportive of Plaintiff's claim for disability but does not discuss or assign error to
23 the ALJ's treatment of these opinions until his reply brief. ECF No. 17 at 4-8.

24 Generally, the Court will not consider arguments that were not actually argued in
25 the opening briefing. *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929
26 (9th Cir. 2003); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.
27 1994). Because Plaintiff failed to raise these issues in his opening brief, the Court
28 declines to consider them.

1 understanding of the disability programs and the source's familiarity with the case
2 record. 20 C.F.R. § 416.927(c).

3 a. Dr. Winfrey, medical expert

4 Plaintiff argues the ALJ was wrong to afford great weight to the opinion of
5 Dr. Nancy Winfrey, the medical expert who testified at the hearing. ECF No. 15 at
6 18. Specifically, Plaintiff alleges Dr. Winfrey did not understand that Plaintiff
7 spent most of his time in his room and that the occasional social outings he did do
8 were only with his mother and girlfriend. *Id.* Plaintiff's allegation that Dr.
9 Winfrey did not understand the nature of Plaintiff's condition is supported by no
10 evidence. Dr. Winfrey reviewed the record, testified as to Plaintiff's conditions
11 and limitations, and specifically acknowledged in her testimony that she was aware
12 of Plaintiff's habits. Tr. 42. Plaintiff has advanced no legal basis for rejecting the
13 expert's conclusions or questioning her comprehension of the record.

14 As to Plaintiff's argument that Dr. Winfrey endorsed his use of a companion
15 animal, her actual testimony was that it was a good idea and helpful to Plaintiff,
16 but she specifically referenced the letter regarding the animals, which clarified the
17 dogs were not service animals and were only for use in the home. Tr. 42, 427. Dr.
18 Winfrey did not state that Plaintiff would need his dogs to accompany him to the
19 workplace.

20 The Court finds the ALJ did not err in giving great weight to Dr. Winfrey's
21 opinion.

22 b. Vocational rehabilitation

23 Plaintiff asserts, with no evidence, that because he was not provided
24 vocational training, this means the Department of Vocational Rehabilitation (DVR)
25 did not believe he could be trained or rehabilitated for gainful employment. ECF
26 No. 15 at 18. It is not established in the record that DVR actually made such a
27 determination. Plaintiff testified vaguely that vocational services with DVR "kind
28 of fell through," and that there was some discrepancy regarding the report and that

1 the counselor thought he was able to work. Tr. 45. The only evidence from DVR
2 is a single certification of disability, noting Plaintiff had “most significant
3 disabilities” and would require multiple services over an extended period of time to
4 become employed. Tr. 276. Plaintiff’s assertion that he was deemed unable to
5 work is not supported by the record. Plaintiff makes no further argument regarding
6 any actions on the part of the ALJ or errors in the assessment, and thus has waived
7 the right to do so.

8 **CONCLUSION**

9 Having reviewed the record and the ALJ’s findings, the Court finds the
10 ALJ’s decision is supported by substantial evidence and free of legal error.

11 Therefore, **IT IS HEREBY ORDERED:**

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

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

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

18 DATED March 30, 2020.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE