

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

Nov 25, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JON P.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 2:19-CV-00035-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 13. Attorney Lora Lee Stover represents Jon P. (Plaintiff); Special Assistant United States Attorney Benjamin J. Groebner 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** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

¹ Andrew 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 applications for Disability Insurance Benefits and
3 Supplemental Security Income on October 23, 2014, alleging disability since July
4 15, 2014 due to anxiety, dysthymic disorder, depression, limited cognitive ability,
5 back injury, left knee injury, left ankle injury, left elbow injury, and headaches.
6 Tr. 153. The applications were denied initially and upon reconsideration. Tr. 206-
7 09, 211-15. Administrative Law Judge (ALJ) Lori Freund held an initial hearing
8 on November 8, 2016, Tr. 79-111, and a supplemental hearing on July 18, 2017,
9 Tr. 112-151. She issued an unfavorable decision on February 21, 2018. Tr. 16-33.
10 Plaintiff requested review from the Appeals Council and the Appeals Council
11 denied the request on November 26, 2018. Tr. 1-5. The ALJ's February 2018
12 decision became the final decision of the Commissioner, which is appealable to the
13 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
14 review on January 23, 2019. ECF No. 1.

15 **STATEMENT OF FACTS**

16 Plaintiff was born in 1967 and was 46 years old as of his alleged onset date.
17 Tr. 30. He dropped out of school in the 11th grade and never completed his GED.
18 Tr. 625. He worked a series of kitchen jobs, including dishwashing, kitchen
19 helper, and cook. Tr. 141. He has a long history of opiate abuse, currently
20 maintained on methadone treatment. Tr. 86, 536, 798. He has also received
21 treatment for long-term depression and social anxiety. Tr. 121.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
26 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
28 only if it is not supported by substantial evidence or if it is based on legal error.

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. §§ 404.1520(a),
18 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
19 four, the burden of proof rests upon the claimant to establish a prima facie case of
20 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
21 met once a claimant establishes that a physical or mental impairment prevents the
22 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
23 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
24 to step five, and the burden shifts to the Commissioner to show (1) the claimant
25 can make an adjustment to other work; and (2) the claimant can perform specific
26 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*,
27 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment
28

1 to other work in the national economy, the claimant will be found disabled. 20
2 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

3 **ADMINISTRATIVE DECISION**

4 On February 21, 2018, the ALJ issued a decision finding Plaintiff was not
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since July 15, 2014, the alleged onset date. Tr. 18.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: persistent depressive disorder, social anxiety disorder, degenerative
10 disc disease of the cervical spine, degenerative disc disease of the lumbar spine,
11 and bilateral congenital glenoid hypoplasia. Id.

12 At step three, the ALJ found Plaintiff did not have an impairment or
13 combination of impairments that met or medically equaled the severity of one of
14 the listed impairments. Tr. 23-24.

15 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
16 he could perform light exertional work, with the following specific limitations:

17 he can lift/carry up to 20 pounds occasionally and 10 pounds
18 frequently, stand/walk 6 hours in an 8-hour workday and sit 6 hours in
19 an 8-hour workday. The claimant is limited to frequent push/pull with
20 the bilateral upper extremities; occasional climbing of ramps and
21 stairs; no climbing of ladders, ropes or scaffolds; frequent balancing,
22 stooping, kneeling and crouching; occasional overhead reaching with
23 the bilateral upper extremities and frequent reaching in all other
24 directions; avoid all exposure to excessive vibration and hazardous
25 machinery. The claimant is limited to simple and repetitive tasks;
26 should avoid working with or around the general public (this includes
no work in any type of public setting such as store, sports arena, etc.);
should avoid any type of tandem jobs/tandem teamwork; and should
avoid any type of fast paced or timed work.

27 Tr. 22.

1 At step four, the ALJ found Plaintiff was unable to perform his past relevant
2 work as a cook, cook helper, or kitchen helper. Tr. 30.

3 At step five, the ALJ determined that, based on the testimony of the
4 vocational expert, and considering Plaintiff's age, education, work experience, and
5 RFC, Plaintiff was capable of performing jobs that existed in significant numbers
6 in the national economy, including the jobs of housekeeping cleaner, price marker,
7 and mail clerk. Tr. 30-31.

8 The ALJ thus concluded Plaintiff was not under a disability within the
9 meaning of the Social Security Act at any time from July 15, 2014, the alleged
10 onset date, through February 21, 2018, the date of the decision. Tr. 33.

11 ISSUES

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

15 Plaintiff contends the ALJ erred by (1) improperly rejecting his symptom
16 testimony; and (2) improperly assessing the residual functional capacity,
17 specifically in failing to account for Plaintiff's statements and Dr. Winfrey's
18 testimony at the hearing.²

19 DISCUSSION

20 1. Plaintiff's symptom statements

21 Plaintiff alleges the ALJ erred in rejecting his symptom testimony without
22 providing adequate reasons. ECF No. 12 at 13-16.

23 It is the province of the ALJ to make credibility determinations. *Andrews v.*
24 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be

25
26 ² Plaintiff also lists a third issue regarding the ALJ making erroneous step
27 five findings. ECF No. 12 at 11. This assignment of error is based on success on
28 either of the other two assigned errors and was not independently briefed.

1 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
2 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for
3 rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen*
4 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
5 (9th Cir. 1995).

6 The ALJ found Plaintiff's medically determinable impairments could
7 reasonably be expected to cause some of the alleged symptoms; however, she
8 found Plaintiff's statements concerning the intensity, persistence and limiting
9 effects of his symptoms were not entirely consistent with the medical evidence and
10 other evidence in the record. Tr. 25. With respect to Plaintiff's physical
11 impairments and claimed limitations, the ALJ found Plaintiff's allegations to be
12 undermined by the lack of supporting objective evidence, Plaintiff's minimal
13 treatment for physical problems, his failure to mention any significant physical
14 problems until late 2016, his repeated reports of being in good physical health, and
15 consistently unremarkable physical exams. Tr. 25-26. Regarding Plaintiff's
16 mental health allegations, the ALJ found his reports to be unsupported by the
17 totality of the record, including the lack of notable objective mental status findings,
18 Plaintiff's improvement with medication compliance and sobriety, his occasional
19 reports that he was doing well, the non-disabling testimony of the medical expert at
20 the hearing, documented activities that were inconsistent with Plaintiff's reports,
21 and misrepresentations in the record regarding substance use. Tr. 26-28.

22 Plaintiff argues the ALJ improperly found his complaints of anxiety and
23 social phobia to be inconsistent with his activities, noting the opinion evidence
24 from Dr. Winfrey and Dr. Arnold supported his allegations. ECF. No. 12 at 14-15.
25 Plaintiff also argues that the activities identified by the ALJ as inconsistent with
26 Plaintiff's allegations do not demonstrate any actual inconsistency, as the record is
27 devoid of evidence regarding the frequency and duration of any of the activities.
28 *Id.* at 15.

1 “If the evidence can reasonably support either affirming or reversing a
2 decision, we may not substitute our judgment for that of the Commissioner.”
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Plaintiff’s argument
4 amounts to a reweighing of the evidence, offering an alternative interpretation of
5 the record and reaching another conclusion. Plaintiff fails to assign any specific
6 legal error to the ALJ’s analysis. Furthermore, Plaintiff has failed to offer any
7 challenge to the ALJ’s other stated reasons, and has therefore waived such
8 arguments. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
9 (9th Cir. 2008).

10 The Court finds that the ALJ’s reasoning is supported by substantial
11 evidence. Unexplained or inadequately explained reasons for failing to seek
12 medical treatment can cast doubt on a claimant’s subjective complaints. *Fair v.*
13 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). A claimant’s daily activities may
14 support an adverse credibility finding if the activities contradict his other
15 testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Inconsistent
16 statements throughout the record are a legitimate factor for the ALJ to consider.
17 *Tonapetyan v. Halter*, 242 F.3d 144, 1148 (9th Cir. 2011). Although it cannot
18 serve as the sole ground for rejecting a claimant’s symptom statements, objective
19 medical evidence is a “relevant factor in determining the severity of the claimant’s
20 pain and its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
21 2001). Therefore, even if the ALJ erred in finding that Plaintiff’s daily activities
22 were inconsistent with his claimed functional limitations, the remaining reasons
23 were specific, clear and convincing, so any error is harmless. *Batson v. Comm’r of*
24 *Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004). The ALJ’s interpretation
25 of the record is supported by substantial evidence.

26 **2. Formulation of the RFC**

27 Plaintiff contends the RFC is incomplete because it failed to account for his
28 alleged physical impairments. ECF No. 12 at 16. As the court finds the ALJ did

1 not err in discounting Plaintiff's subjective complaints, the ALJ did not err in
2 failing to include the alleged physical limitations when formulating the RFC.

3 Plaintiff further alleges the RFC was incomplete due to the ALJ's failure to
4 include Dr. Winfrey's testimony regarding the need for an understanding
5 supervisor and a job coach or other companion on his first day of work. ECF No.
6 12 at 17. Plaintiff's argument misstates Dr. Winfrey's testimony. At the hearing,
7 Dr. Winfrey testified that she did not believe Plaintiff would need an additional
8 person on the job with him, though someone going with him the first day could be
9 helpful. Tr. 125-26. Additionally, she testified that Plaintiff should have
10 supervision that was not "over the shoulder," and that he "should have an informed
11 supervisor who understands the issues, and doesn't, you know, disregard the fact
12 that he has an anxiety disorder." Tr. 124-25. However, these features were not
13 presented as imperatives in the workplace, but rather factors that would optimize
14 success. *Id.* An ALJ is not required to include recommendations in the RFC that
15 are not specific functional limitations. *Valentine v. Comm'r Soc. Sec. Admin.*, 574
16 F.3d 685, 691-92 (9th Cir. 2009).

17 Furthermore, the vocational expert testified that none of the jobs she
18 identified required supervision unless the worker was not doing his job, and that
19 they therefore did not involve "over the shoulder kind of supervision." Tr. 146.
20 Therefore, even if the ALJ had erred in omitting the supervision features from the
21 RFC, it would be a harmless error.

22 CONCLUSION

23 Having reviewed the record and the ALJ's findings, the Court finds the
24 ALJ's decision is supported by substantial evidence and free of legal error and is
25 therefore affirmed. Therefore, **IT IS HEREBY ORDERED:**

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

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

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

4 **IT IS SO ORDERED.**

5 DATED November 25, 2019.



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A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE