

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

Sep 15, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEREMY O.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:20-CV-00199-FVS

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

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 15 and 16. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney D. James Tree. The Defendant is represented by Special Assistant United States Attorney Sarah L. Martin. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 15, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 16.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Plaintiff Jeremy O. protectively filed for supplemental security income on
3 September 21, 2016, alleging an onset date of September 1, 2014. Tr. 166-71.
4 Benefits were denied initially, Tr. 99-102, and upon reconsideration, Tr. 108-14.
5 Plaintiff appeared for a hearing before an administrative law judge (“ALJ”) on
6 November 5, 2018. Tr. 29-73. Plaintiff was represented by counsel and testified at
7 the hearing. *Id.* The ALJ denied benefits, Tr. 12-28, and the Appeals Council
8 denied review. Tr. 1. The matter is now before this Court pursuant to 42 U.S.C. §
9 1383(c)(3).

10 **BACKGROUND**

11 The facts of the case are set forth in the administrative hearing and
12 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.
13 Only the most pertinent facts are summarized here.

14 Plaintiff was 27 years old at the time of the hearing. Tr. 33. He completed
15 8th grade. Tr. 69. At the time of the hearing, Plaintiff lived with his mother, who is
16 also his caregiver, and his two brothers. Tr. 34. Plaintiff has no past relevant
17 work. Tr. 34. He reported that he gets fired from a lot of jobs because he is not
18 “fit to work in the field,” and he is not fast enough. Tr. 38-39, 42.

19 Plaintiff testified that because of his depression, he cannot come out of his
20 room every two weeks for about two to three days at a time. Tr. 40. He reported
21 that he gets “bad anxiety” when he is around a lot of people, and he has no friends.

1 Tr. 35-36. Plaintiff testified that he was hit in the head with a pole while working
2 on a job site in 2016, and since then he has flashbacks and memory problems. Tr.
3 40-41, 45. He has migraines every week that last a day or two, and neck pain that
4 prevents him from turning his head to the right. Tr. 41. Plaintiff's mother also
5 testified that she is compensated by DSHS to care for Plaintiff for 59 hours per
6 month. Tr. 55, 63.

7 STANDARD OF REVIEW

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

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. If the evidence in the record "is
21 susceptible to more than one rational interpretation, [the court] must uphold the

1 ALJ's findings if they are supported by inferences reasonably drawn from the
2 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
3 court "may not reverse an ALJ's decision on account of an error that is harmless."
4 *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate
5 nondisability determination." *Id.* at 1115 (quotation and citation omitted). The
6 party appealing the ALJ's decision generally bears the burden of establishing that
7 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered "disabled" within
10 the meaning of the Social Security Act. First, the claimant must be "unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
15 "of such severity that he is not only unable to do his previous work[,] but cannot,
16 considering his age, education, and work experience, engage in any other kind of
17 substantial gainful work which exists in the national economy." 42 U.S.C. §
18 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
21 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work

1 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
2 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
3 C.F.R. § 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
7 “any impairment or combination of impairments which significantly limits [his or
8 her] physical or mental ability to do basic work activities,” the analysis proceeds to
9 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
10 this severity threshold, however, the Commissioner must find that the claimant is
11 not disabled. 20 C.F.R. § 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. §
15 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
16 enumerated impairments, the Commissioner must find the claimant disabled and
17 award benefits. 20 C.F.R. § 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),
21 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
2 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

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

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
21 capable of performing other work; and (2) such work "exists in significant

1 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
2 700 F.3d 386, 389 (9th Cir. 2012).

3 ALJ’S FINDINGS

4 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
5 activity since September 21, 2016, the application date. Tr. 17. At step two, the
6 ALJ found Plaintiff has the following severe impairments: attention deficit
7 disorder/attention deficit hyperactivity disorder, affective disorder, anxiety related
8 disorder, learning disorder, and substance abuse/addiction disorder. Tr. 17. At
9 step three, the ALJ found that Plaintiff does not have an impairment or
10 combination of impairments that meets or medically equals the severity of a listed
11 impairment. Tr. 17. The ALJ then found that Plaintiff has the RFC

12 to perform a full range of work at all exertional levels but with the
13 following nonexertional limitations: he can perform simple routine
14 tasks with short and simple instructions; he must have no requirement
15 to interact with the general public in the performance of job tasks; he
16 can have incidental interaction with coworkers, but he cannot perform
17 tandem work with them; he needs a stable and routine job environment;
18 and he cannot work at a fast production rate pace.

16 Tr. 19. At step four, the ALJ found that Plaintiff has no past relevant work. Tr.
17 22. At step five, the ALJ found that considering Plaintiff’s age, education, work
18 experience, and RFC, there are jobs that exist in significant numbers in the national
19 economy that Plaintiff can perform, including: kitchen helper, lab equipment
20 cleaner, yard worker, and housekeeper. Tr. 23. On that basis, the ALJ concluded
21

1 that Plaintiff has not been under a disability, as defined in the Social Security Act,
2 since September 21, 2016, the date the application was filed. Tr. 24.

3 ISSUES

4 Plaintiff seeks judicial review of the Commissioner's final decision denying
5 him supplemental security income benefits under Title XVI of the Social Security
6 Act. ECF No. 15. Plaintiff raises the following issues for this Court's review:

- 7 1. Whether the ALJ improperly discredited Plaintiff's symptom claims;
- 8 2. Whether the ALJ properly weighed the medical opinion evidence;
- 9 3. Whether the ALJ erred at step two; and
- 10 4. Whether the ALJ erred properly considered the lay witness statements.

11 DISCUSSION

12 A. Medical Opinions

13 There are three types of physicians: "(1) those who treat the claimant
14 (treating physicians); (2) those who examine but do not treat the claimant
15 (examining physicians); and (3) those who neither examine nor treat the claimant
16 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).
17 Generally, a treating physician's opinion carries more weight than an examining
18 physician's, and an examining physician's opinion carries more weight than a
19 reviewing physician's. *Id.* If a treating or examining physician's opinion is
20 uncontradicted, the ALJ may reject it only by offering "clear and convincing
21

1 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
2 1211, 1216 (9th Cir. 2005). Conversely, “[i]f a treating or examining doctor's
3 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
4 providing specific and legitimate reasons that are supported by substantial
5 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).
6 “However, the ALJ need not accept the opinion of any physician, including a
7 treating physician, if that opinion is brief, conclusory and inadequately supported
8 by clinical findings.” *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
9 (9th Cir. 2009) (quotation and citation omitted).

10 Here, Plaintiff argues the ALJ erroneously considered the opinion of
11 examining psychologist Thomas Genthe, Ph.D. ECF No. 15 at 3-8. In January
12 2018, Dr. Genthe opined that Plaintiff had severe limitations in his ability to adapt
13 to changes in a routine work setting. Tr. 367. Dr. Genthe additionally opined that
14 Plaintiff had marked limitations in his ability to understand , remember, and persist
15 in tasks by following detailed instructions; perform activities within a schedule,
16 maintain regular attendance, and be punctual within customary tolerances without
17 special supervision; learn new tasks; perform routine tasks without special
18 supervision; ask simple questions or request assistance; communicate and perform
19 effectively in a work setting; maintain appropriate behavior in a work setting;
20 complete a normal work day and work week without interruptions from
21 psychologically based symptoms; and set realistic goals and plan independently.

1 Tr. 367. Finally, Dr. Genthe opined that Plaintiff’s “overall severity rating” was
2 marked. Tr. 367. The ALJ found Dr. Genthe’s opinion “least persuasive” for
3 several reasons. Tr. 21.

4 First, the ALJ found that

5 [t]he primary basis for the ratings appear to be [Plaintiff’s] ‘extremely
6 low intellectual abilities.’ Dr. Genthe, however, characterized
7 [Plaintiff’s] intellectual disability as only mild. There was little
8 discussion about it, instead focusing on depression, anxiety, and
9 ADHD. Dr. Genthe observed [Plaintiff] as someone having normal
10 inflections, balanced conversations, well-articulated words, normal
11 orientation, and normal immediate memory. It remains unclear how
12 exactly Dr. Genthe viewed [Plaintiff’s] reduced intellectual capacity as
13 the primary barrier to sustaining work, especially considering that Dr.
14 Genthe did not perform any intelligence testing.

15 Tr. 21. However, as noted by Plaintiff, Dr. Genthe explicitly noted “*both* his
16 mental and intellectual disorders left [Plaintiff] unemployable” and Dr. Genthe
17 “reviewed [Plaintiff’s] educational history, noted a prior intellectual assessment
18 from 2014, and completed an objective [mental status examination] that showed
19 several limitations in new learning, understanding, [and] social maturity.” ECF
20 No. 15 at 5 (citing Tr. 365, 368-70). While not mentioned in the ALJ’s decision, in
21 addition to finding Plaintiff would be impaired “indefinitely” from an intellectual
perspective, Dr. Genthe specifically noted that Plaintiff would be impaired for
twelve months due to his mental health impairments, and included a narrative
finding that Plaintiff “is unlikely to function adequately in a work setting until his
psychological symptoms have been managed more effectively.” Tr. 368. In

1 addition, Dr. Genthe diagnosed Plaintiff with major depressive disorder,
2 generalized anxiety disorder, other specified anxiety disorder, with post-trauma
3 like features, and attention-deficit/hyperactivity disorder; took a lengthy
4 psychosocial history as part of the clinical interview; and found on examination
5 that Plaintiff had tangential and circumstantial speech, poor
6 understanding/perception, could recall only 1 of 4 objects after five-minute delay,
7 did not know the number of weeks in a year, was unable to spell ‘world’ forward
8 and backward, had poor social maturity, and had poor to fair insight and judgment.
9 Tr. 366, 369-70.

10 Defendant generally argues that the ALJ may reject an opinion that is
11 unsupported by clinical findings. ECF No. 16 at 3; see *Bayliss*, 427 F.3d at 1216
12 (a physician’s opinion may be rejected if it is contradicted by that physician’s own
13 treatment notes). However, as discussed in detail above, Dr. Genthe conducted a
14 detailed clinical interview and objective mental status examination. Moreover,
15 when explaining his reasons for rejecting medical opinion evidence, the ALJ must
16 do more than state a conclusion; rather, the ALJ must “set forth his own
17 interpretations and explain why they, rather than the doctors’, are correct.”
18 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). “This can be done by setting
19 out a detailed and thorough summary of the facts and conflicting clinical evidence,
20 stating his interpretation thereof, and making findings.” *Id.* Here, the ALJ failed
21 to properly summarize and interpret the entirety of Dr. Genthe’s clinical findings

1 as to Plaintiff's claimed intellectual and psychological impairments, including his
2 objective mental status examination results and clinical interview findings. Thus,
3 his conclusory finding that the limitations assessed by Dr. Genthe were
4 "primar[ily] based" on Plaintiff's intellectual ability, as opposed to both his
5 intellectual and psychological impairments, is not supported by substantial
6 evidence. This was not a specific and legitimate reason to reject Dr. Genthe's
7 opinion.

8 Second, the ALJ found that "Dr. Genthe believed that [Plaintiff] would be
9 unable to perform simple and repetitive tasks, but again there was no explanation
10 justifying this this determination." Tr. 21. In further support of this finding, the
11 ALJ cited a consultative psychological examination by Kristen Nestler, M.D.
12 finding Plaintiff could follow a three-step command and spell 'world' correctly
13 forward and backwards; and three treatment notes across the relevant adjudicatory
14 period indicating Plaintiff had normal attention and concentration span, intact
15 recent and remote memory, and "good" ability to learn. Tr. 22 (citing Tr. 289, 392,
16 515). Based on this evidence, the ALJ concluded that "Dr. Genthe's assessment
17 not only lacked a sufficient explanation but also was inconsistent with others'
18 observations and examination findings." Tr. 22.

19 Relevant factors to evaluating any medical opinion include the amount of
20 relevant evidence that supports the opinion, the quality of the explanation provided
21 in the opinion, and the consistency of the medical opinion with the record as a

1 whole. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*,
2 495 F.3d 625, 631 (9th Cir. 2007). However, as noted by Plaintiff, the “ALJ
3 misstates Dr. Genthe’s opinion. He did not find [Plaintiff] incapable of simple,
4 repetitive tasks, but instead assessed ‘significant’ limitations in
5 understanding/persisting/remembering very short and simple instructions and ‘very
6 significant’ limitations in most other functions, such as learning new tasks or
7 performing routine tasks without special supervision.” ECF No. 15 at 5. The
8 Court agrees. Dr. Genthe’s narrative explanation states that Plaintiff’s low
9 intellectual abilities were “likely to interfere” with even simple and repetitive
10 work; however, contrary to the ALJ’s finding, at no point did Dr. Genthe opine that
11 Plaintiff was “unable” to perform simple and repetitive tasks. *See* Tr. 368.
12 Moreover, the Court’s review of Dr. Nestler’s examination includes additional
13 findings that she had limited outside records; was “unable to verify any objective
14 cognitive deficits although he did have very poor math skills; could “not confirm
15 whether or not [Plaintiff] meets criteria for any specific learning disabilities”; and
16 during mental status examination Plaintiff presented as “younger than his stated
17 age,” was guarded and difficult to engage, had “fair” eye contact, had restricted
18 and depressed affect, did not attempt serial 7s, and was unsuccessful at serial 3s.
19 Tr. 286-87.

20 Finally, while the ALJ properly cites more benign findings in the record
21 such as Plaintiff’s “normal” attention, concentration, and memory, the record also

1 contains consistent findings of depressed and anxious presentation, difficulty with
2 memory, restricted or blunt affect, speech difficulties, limited eye contact, fair to
3 poor insight and judgment, and concrete thought association. Tr. 278, 281, 284,
4 286, 289, 291, 295, 297, 300, 378, 411, 422-23,449, 452, 460, 469, 517, 546. For
5 all of these reasons, the ALJ's rejection of Dr. Genthe's finding as to Plaintiff's
6 ability to perform simple and repetitive tasks because it was insufficiently
7 explained and inconsistent with the observations of "others" was not specific,
8 legitimate, and supported by substantial evidence.

9 Third, the ALJ found the "information that Dr. Genthe relied upon may not
10 have been fully accurate." Tr. 22. Specifically, the ALJ noted that Plaintiff
11 reported to Dr. Genthe that he had "bad anxiety" around others which caused him
12 to "stay home and lie down," that he rarely went out since his injury, and that he
13 did no social activities. Tr. 22, 365-66. The ALJ found these statements were
14 inconsistent with one previous report in 2016 that he did not isolate and that he
15 hung out with friends, and another report in early 2017 that he "sees friends
16 occasionally." Tr. 22 (citing Tr. 280, 286). However, as noted by Plaintiff, the
17 records cited by the ALJ in support of these arguments also included Plaintiff's
18 report that he "avoids a lot of people" due to trust issues, only "occasionally" sees
19 friends, "just play[s] with [his] little brother," does not participate in community or
20 cultural activities, and was unable to describe any hobbies or activities. Tr. 280-
21 81, 286. Thus, the Court is unable to discern inconsistency between these

1 statements such that it would rise to the level of a specific and legitimate reason,
2 supported by substantial evidence, to discount the opinion of Dr. Genthe.

3 Fourth, and finally, the ALJ found that Plaintiff's activities are not consistent
4 with Dr. Genthe's ratings. Tr. 22. An ALJ may discount an opinion that is
5 inconsistent with a claimant's reported functioning. *Morgan v. Comm'r Soc. Sec.*
6 *Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). In support of this finding, the ALJ
7 found that Plaintiff "has been able to live independently on his own for years," he
8 "has friends and a girlfriend (or had one, as the case may be)," he is cooperative
9 and friendly to providers and evaluators, he behaves appropriately and can
10 complete lengthy interviews, he does household chores independently, shops for
11 groceries, prepares his own meals, and manages taking his own medication. Tr. 22
12 (citing Tr. 286, 289, 366, 369). Plaintiff argues that the ALJ "failed to indicate
13 how [these activities are] inconsistent with Dr. Genthe's findings." ECF No. 15 at
14 7. The Court agrees. As noted above, when explaining his reasons for rejecting
15 medical opinion evidence, the ALJ must do more than state a conclusion; rather,
16 the ALJ must "set forth his own interpretations and explain why they, rather than
17 the doctors', are correct." *Reddick*, 157 F.3d at 725.

18 Here, the ALJ fails to offer any explanation of why Plaintiff's "activities"
19 are inconsistent with the specific severe and marked limitations opined by Dr.
20 Genthe. Notably, at least a portion of the reported activities cited by the ALJ were
21 taken from Plaintiff's reports to Dr. Genthe, including his cooperative behavior at

1 the appointment and his ability to perform basic self-care and “domestic skills,”
2 which Dr. Genthe presumably considered when making his overall assessment of
3 Plaintiff’s ability to perform basic work activities. *See* Tr. 365-66. Moreover, the
4 ALJ’s vague reference to Plaintiff living “independently on his own for years,”
5 with no further evidence as to Plaintiff’s activities during that time, or at what
6 point those “years” of independent living took place during the adjudicatory
7 period, does not rise to the level of substantial evidence with which to discount Dr.
8 Genthe’s opinion. *See* Tr. 56-57 (Plaintiff’s mother testified that when he moved
9 out he was living with his “biological dad”). Finally, while the ALJ relies on
10 evidence that Plaintiff was cooperative and friendly with evaluators and treatment
11 providers, the Court’s independent review of the record indicates that at least one
12 of the evaluators, whose opinion the ALJ found “the most persuasive,” noted that
13 Plaintiff was a very poor historian and difficult to engage. Tr. 284. For all of these
14 reasons, any alleged inconsistency between the marked and severe limitations
15 opined by Dr. Genthe, and Plaintiff’s ability to perform basic household, “have
16 friends,” and be cooperative in a treatment setting, is not a specific and legitimate
17 reason, supported by substantial evidence, to reject Dr. Genthe’s opinion.

18 Based on the foregoing, the Court finds the ALJ’s reasons for rejecting Dr.
19 Genthe’s opinion were not specific, legitimate, and supported by substantial
20 evidence. Dr. Genthe’s opinion must be reconsidered on remand.

B. Plaintiff's Symptom Claims

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom he has alleged; he need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony."). "The clear and convincing [evidence] standard is the most demanding required in Social Security

1 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
2 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

3 Here, the ALJ found Plaintiff’s medically determinable impairments could
4 reasonably be expected to cause some of the alleged symptoms; however,
5 Plaintiff’s “statements concerning the intensity, persistence and limiting effects of
6 these symptoms are not entirely consistent with the medical evidence and other
7 evidence in the record” for several reasons. Tr. 19.

8 As an initial matter, the ALJ briefly noted that “[o]ne would expect someone
9 with [Plaintiff’s] level of alleged mental functioning to be unable to live on his
10 own for years, which he did prior to living with his mom.” Tr. 20 (citing Tr. 281).

11 A claimant need not be utterly incapacitated in order to be eligible for benefits.

12 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *see also Orn*, 495 F.3d at 639

13 (“the mere fact that a plaintiff has carried on certain activities . . . does not in any
14 way detract from her credibility as to her overall disability.”). Regardless, even

15 where daily activities “suggest some difficulty functioning, they may be grounds
16 for discrediting the [Plaintiff’s] testimony to the extent that they contradict claims

17 of a totally debilitating impairment.” *Molina*, 674 F.3d at 1113. However, this

18 finding is supported by a single report from Plaintiff in 2016 that he “has been on
19 his own” for 3 years; and the ALJ fails to consider testimony from Plaintiff’s

20 mother that before he moved back in with her in 2016, Plaintiff was living with his
21 biological father. *See* Tr. 56-57, 281.

1 In considering Plaintiff's symptom claims, the ALJ "must specifically
2 identify the testimony she or he finds not to be credible and must explain what
3 evidence undermines the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208
4 (9th Cir. 2001). Here, the ALJ cites no evidence of activities performed on a daily
5 basis, or transferable to a work environment; rather, the ALJ generally references a
6 portion of the relevant adjudicatory period during which Plaintiff reported he was
7 "on his own," with no further indication as to what specific activities Plaintiff
8 performed, or any finding as to how said activities undermine Plaintiff's symptom
9 claims. *See Orn*, 495 F.3d at 639 (daily activities may be "grounds for [rejecting
10 symptom claims] 'if a claimant is able to spend a substantial part of his day
11 engaged in pursuits involving the performance of physical functions that are
12 transferable to a work setting.'"). Thus, the ALJ's general reference to an
13 inconsistency between Plaintiff's mental symptom claims, and his single report
14 that he was "on his own" for three years, does not rise to the level of a clear and
15 convincing reason, supported by substantial evidence, to discredit the entirety of
16 Plaintiff's symptom claims.

17 Next, the ALJ found Plaintiff's statements are inconsistent with the mental
18 examination findings. Tr. 20. The medical evidence is a relevant factor in
19 determining the severity of a claimant's pain and its disabling effects. *Rollins v.*
20 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); 20 C.F.R. § 404.1529(c)(2).
21 However, an ALJ may not discredit a claimant's pain testimony and deny benefits

1 solely because the degree of pain alleged is not supported by objective medical
2 evidence. *Rollins*, 261 F.3d at 857; *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th
3 Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). Here, the ALJ
4 almost entirely supported this finding by citing observations made by Dr. Genthe
5 during his examination of Plaintiff, which includes findings of difficulty with
6 judgment and insight, poor social maturity, difficulty recalling objects after a 5-
7 minute delay, delayed responses and overinclusion of detail in responses, and
8 inability to spell ‘world’ or perform a calculation. Tr. 20. The ALJ also cites
9 several records that include “fair to normal” provider examination findings. Tr. 20
10 (citing Tr. 422-23, 527, 536). However, as noted by Plaintiff, the record also
11 contains ongoing evidence of depressed and anxious presentation, difficulty with
12 memory, restricted or blunt affect, speech difficulties, limited eye contact, fair to
13 poor insight and judgment, and concrete thought association. ECF No. 15 at 15;
14 Tr. 278, 281, 284, 286, 289, 291, 295, 297, 300, 378, 411, 422-23, 449, 452, 460,
15 469, 517, 546. Moreover, because this portion of the ALJ’s analysis is, at least in
16 part, dependent on the ALJ’s evaluation of Dr. Genthe’s opinion, the Court finds
17 this reason should be reconsidered on remand.

18 Similarly, the ALJ found that objective test results and mental examination
19 findings did not support a finding that Plaintiff’s “current alleged mental
20 functioning relates to a brain injury in 2016.” Tr. 20. In support of this finding,
21 the ALJ generally cites medical records pertaining to Plaintiff’s treatment for a

1 head injury in 2016, with specific reference to “mental status examination findings
2 [that] were not indicative of severe cognitive dysfunction,” and “normal” objective
3 test results. Tr. 20. Based on these generally cited records, the ALJ “[did] not
4 accept the notion that [Plaintiff’s] 2016 work injury had caused significant brain
5 trauma and severe mental limitations given the lack of evidence of such
6 connection.” Tr. 20. However, as noted by Plaintiff, examining physician Dr.
7 Nestler specifically noted that she was “unable to verify” objective cognitive
8 deficits, although he had “very poor math skills,” and she could not “confirm”
9 whether he met the criteria for a specific learning disability. Tr. 287. Moreover,
10 the ALJ fails to consider Dr. Genthe’s finding of “extremely low intellectual
11 abilities . . . that are likely to interfere with his ability to function”; and his
12 remarkable mental status examination findings of poor social maturity, tangential
13 and circumstantial speech, memory and concentration difficulties, and poor to fair
14 insight and judgment. Tr. 368-70. Thus, as above, particularly in light of the need
15 to reconsider Dr. Genthe’s opinion, this reasoning should be reconsidered on
16 remand.

17 Finally, the ALJ noted “the lack of treatment notes prior to 2016 is
18 concerning, especially given [Plaintiff’s] allegation of disability since 2014 and
19 special education services while in school. One would expect to see some level of
20 treatment and mental evaluation prior to 2016.” Tr. 20. Unexplained, or
21 inadequately explained, failure to seek treatment or follow a prescribed course of

1 treatment may be the basis for an adverse credibility finding unless there is a
2 showing of a good reason for the failure. *Orn*, 495 F.3d at 638. Plaintiff argues
3 that the ALJ “reversibly erred” in this case by discrediting Plaintiff’s symptom
4 claims on this basis, because he “did not complain of any shortage of records until
5 he issued his written decision. If the ALJ felt there was a need for additional
6 remote records he could have said so earlier and obtained them or had [Plaintiff]
7 obtain them.” ECF No. 15 at 18-20. This argument is inapposite.

8 Plaintiff is correct that the ALJ has an independent duty to fully and fairly
9 develop a record in order to make a fair determination as to disability, even where,
10 as here, the claimant is represented by counsel. *See Tonapetyan v. Halter*, 242
11 F.3d 1144, 1150 (9th Cir. 2001). However, only “[a]mbiguous evidence, or the
12 ALJ's own finding that the record is inadequate to allow for proper evaluation of
13 the evidence, triggers the ALJ's duty to ‘conduct an appropriate inquiry.’” *Id.*
14 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir.1996)). Further, “an ALJ
15 is not required to order every medical evaluation that could conceivably shed light
16 on a claimant's condition, but rather just those that would resolve ambiguities or
17 inadequacies in the record.” *Lloyd v. Astrue*, No. C-11-4902-EMC, 2013 WL
18 503389, at *5 (N.D. Cal. Feb. 8, 2013) (*citing Mayes v. Massanari*, 276 F.3d 453,
19 459-60 (9th Cir. 2001)). It is Plaintiff’s duty to prove that he is disabled; and this
20 burden cannot be shifted to the ALJ simply by virtue of the ALJ’s duty to develop
21 the record. *See Mayes*, 276 F.3d at 459-60. The ALJ did not find, and the Court is

1 unable to discern, any inadequacy or ambiguity that did not allow for proper
2 evaluation of the record as a whole. Thus, the ALJ did not err in failing to further
3 develop the record in this case.

4 Regardless, in light of the need to remand for reconsideration of Dr.
5 Genthe's opinion, and because the ALJ's analysis of Plaintiff's symptom claims
6 was dependent on the ALJ's analysis of Dr. Genthe's opinion, the ALJ must
7 reconsider Plaintiff's symptom claims on remand. On remand, as noted below,
8 Plaintiff shall also be given the opportunity for a new hearing, and will have the
9 opportunity to submit additional evidence from the relevant adjudicatory period.

10 **C. Additional Assignments of Error**

11 Plaintiff additionally argues that the ALJ erred at step two by failing to
12 properly consider Plaintiff's alleged traumatic brain injury and neck injury; and
13 failing to properly consider lay witness statements, including an assessment
14 performed by a DSHS evaluator, and testimony from Plaintiff's mother/caregiver.
15 ECF No. 15 Because the analysis of Plaintiff's alleged physical impairments and
16 the lay witness evidence is dependent on the ALJ's reevaluation of Plaintiff's
17 symptom claims, and the medical evidence, including the medical opinion
18 evidence discussed above, the Court declines to address these challenges in detail
19 here. On remand, the ALJ is instructed to reconsider Plaintiff's symptom claims,
20 the medical opinion evidence, the lay witness statements, and conduct a new
21 sequential analysis, including a reassessment of the step five finding if necessary.

REMEDY

1
2 The decision whether to remand for further proceedings or reverse and
3 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
4 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
5 where “no useful purpose would be served by further administrative proceedings,
6 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*
7 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
8 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280
9 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a
10 district court may abuse its discretion not to remand for benefits when all of these
11 conditions are met). This policy is based on the “need to expedite disability
12 claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that
13 must be resolved before a determination can be made, and it is not clear from the
14 record that the ALJ would be required to find a claimant disabled if all the
15 evidence were properly evaluated, remand is appropriate. *See Benecke v.*
16 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,
17 1179-80 (9th Cir. 2000).

18 The Court finds that further administrative proceedings are appropriate. *See*
19 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
20 (remand for benefits is not appropriate when further administrative proceedings
21 would serve a useful purpose). Here, the ALJ erred in considering Plaintiff’s

1 symptom claims, and the examining medical opinion of Dr. Genthe, which calls into
2 question whether the assessed RFC, and resulting hypothetical propounded to the
3 vocational expert, are supported by substantial evidence. “Where,” as here, “there is
4 conflicting evidence, and not all essential factual issues have been resolved, a
5 remand for an award of benefits is inappropriate.” *Treichler*, 775 F.3d at 1101.
6 Instead, the Court remands this case for further proceedings. On remand, the ALJ
7 must reconsider the step two finding. The ALJ must reconsider Plaintiff’s symptom
8 claims and the lay witness statements. The ALJ must also reconsider the medical
9 opinion evidence, and provide legally sufficient reasons for evaluating the opinions,
10 supported by substantial evidence. If necessary, the ALJ should order additional
11 consultative examinations and, if appropriate, take additional testimony from a
12 medical expert. Finally, the ALJ should reconsider the remaining steps in the
13 sequential analysis, reassess Plaintiff’s RFC and, if necessary, take additional
14 testimony from a vocational expert which includes all of the limitations credited by
15 the ALJ.

16 Accordingly, **IT IS HEREBY ORDERED:**

- 17 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**,
18 and the matter is **REMANDED** to the Commissioner for additional
19 proceedings consistent with this Order.
- 20 2. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.
- 21 3. Application for attorney fees may be filed by separate motion.

