

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

Oct 18, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| <p>SHAWN PATRICK S.,¹</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>KILOLO KIJAKAZI,² COMMISSIONER OF SOCIAL SECURITY,</p> <p style="text-align: right;">Defendant.</p> | | <p>NO: 2:20-CV-0296-LRS</p> <p>ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT</p> |
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BEFORE THE COURT are the parties’ cross-motions for summary judgment.

ECF Nos. 16, 17. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Cory J. Brandt. Defendant is represented by Special Assistant United States Attorney Jeffrey E. Staples. The

¹ Plaintiff’s last initial is used to protect his privacy.

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. The Court therefore substitutes Kilolo Kijakazi as the Defendant and directs the Clerk to update the docket sheet.

1 Court, having reviewed the administrative record and the parties' briefing, is fully
2 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 16, is
3 denied and Defendant's Motion, ECF No. 17, is granted.

4 **JURISDICTION**

5 Plaintiff Shawn S. (Plaintiff), filed for supplemental security income (SSI) on
6 November 2, 2017, and alleged an onset date of October 30, 2017. Tr. 93, 285-89.
7 Benefits were denied initially, Tr. 193-96, and upon reconsideration, Tr. 199-201.
8 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on February
9 11, 2019. Tr. 86-133. On April 18, 2019, the ALJ issued an unfavorable decision,
10 Tr. 24-42, and on June 24, 2020, the Appeals Council denied review. Tr. 1-7. The
11 matter is now before this Court pursuant to 42 U.S.C. § 1383(c)(3).

12 **BACKGROUND**

13 The facts of the case are set forth in the administrative hearing and transcripts,
14 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
15 therefore only summarized here.

16 Plaintiff was born in 1967 and was 51 years old at the time of the hearing. Tr.
17 285. He graduated from high school and has two A.A. degrees in automotive
18 technician and robotics technician. Tr. 432, 441. Plaintiff has work experience as
19 loan consultant, electrical control systems designer, and fast food worker. Tr. 121-
20 27. He testified he is limited by asthma, digestive issues, environmental and food
21 allergies, MRSA, and excruciating pain in his back, Tr. 103-13. He has three to four
"bad days" per month which wipe him out for two to three days afterward. Tr. 109.

STANDARD OF REVIEW

1
2 A district court's review of a final decision of the Commissioner of Social
3 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
4 limited; the Commissioner's decision will be disturbed "only if it is not supported by
5 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
6 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
7 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
8 citation omitted). Stated differently, substantial evidence equates to "more than a
9 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
10 In determining whether the standard has been satisfied, a reviewing court must
11 consider the entire record as a whole rather than searching for supporting evidence in
12 isolation. *Id.*

13 In reviewing a denial of benefits, a district court may not substitute its
14 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
15 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
16 rational interpretation, [the court] must uphold the ALJ's findings if they are
17 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
18 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's
19 decision on account of an error that is harmless." *Id.* An error is harmless "where it
20 is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115
21 (quotation and citation omitted). The party appealing the ALJ's decision generally

1 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
2 396, 409-10 (2009).

3 **FIVE-STEP EVALUATION PROCESS**

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

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
16 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
17 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
18 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
19 C.F.R. § 416.920(b).

20 If the claimant is not engaged in substantial gainful activity, the analysis
21 proceeds to step two. At this step, the Commissioner considers the severity of the
claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from

1 “any impairment or combination of impairments which significantly limits [his or
2 her] physical or mental ability to do basic work activities,” the analysis proceeds to
3 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
4 this severity threshold, however, the Commissioner must find that the claimant is
5 not disabled. 20 C.F.R. § 416.920(c).

6 At step three, the Commissioner compares the claimant’s impairment to
7 severe impairments recognized by the Commissioner to be so severe as to preclude
8 a person from engaging in substantial gainful activity. 20 C.F.R. §
9 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
10 enumerated impairments, the Commissioner must find the claimant disabled and
11 award benefits. 20 C.F.R. § 416.920(d).

12 If the severity of the claimant’s impairment does not meet or exceed the
13 severity of the enumerated impairments, the Commissioner must pause to assess
14 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
15 defined generally as the claimant’s ability to perform physical and mental work
16 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
17 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

18 At step four, the Commissioner considers whether, in view of the claimant’s
19 RFC, the claimant is capable of performing work that he or she has performed in
20 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
21 capable of performing past relevant work, the Commissioner must find that the

1 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
2 performing such work, the analysis proceeds to step five.

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

12 The claimant bears the burden of proof at steps one through four above.
13 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
14 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
15 capable of performing other work; and (2) such work "exists in significant
16 numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
17 700 F.3d 386, 389 (9th Cir. 2012).

18 **ALJ'S FINDINGS**

19 At step one, the ALJ found Plaintiff did not engage in substantial gainful
20 activity since October 30, 2017, the application date. Tr. 29. At step two, the ALJ
21 found that Plaintiff has the following medically determinable impairments: asthma,
chronic allergies, chronic sinusitis, degenerative disc disease of the lumbar spine,

1 and irritable bowel syndrome. Tr. 29. At step three, the ALJ found that Plaintiff
2 does not have an impairment or combination of impairments that meets or medically
3 equals the severity of a listed impairment. Tr. 32.

4 The ALJ then found that Plaintiff has the residual functional capacity to
5 perform light work except:

6 the claimant can sit up to eight hours, and stand or walk at least six
7 hours, of an eight-hour workday with normal breaks. The claimant
8 must avoid climbing ladders, ropes, or scaffolds, and can occasionally
9 climb ramps or stairs. The claimant can occasionally stoop, kneel,
10 crouch, crawl, and balance. The claimant must avoid unprotected
11 heights and hazardous machinery, concentrated exposure to wetness
12 and humidity, and avoid all exposure to respiratory irritants such as
13 industrial fumes, odors, dusts, gasses, and poorly ventilated areas.

14 Tr. 32.

15 At step four, the ALJ found that Plaintiff is capable of performing past
16 relevant work as a CAD/CAM drafter. Tr. 35. Alternatively, at step five, after
17 considering the testimony of a vocational expert and Plaintiff's age, education, work
18 experience, and residual functional capacity, the ALJ found there are other jobs
19 existing in significant numbers in the national economy that Plaintiff can perform
20 such as routing clerk, mail clerk, and photocopy machine operator. Tr. 36-37. Thus,
21 the ALJ concluded that Plaintiff has not been under a disability, as defined in the
Social Security Act, since October 30, 2017, the date the application was filed. Tr.
37.

ISSUES

1 Plaintiff seeks judicial review of the Commissioner’s final decision denying
2 supplemental security income under Title XVI of the Social Security Act. ECF No.
3 16. Plaintiff raises the following issues for review:

- 4 1. Whether the ALJ properly considered the medical opinion evidence;
- 5 2. Whether the ALJ properly considered Plaintiff’s subjective testimony;
- 6 and
- 7 3. Whether the ALJ properly conducted the step four analysis.

8 ECF No. 16 at 7.

9 DISCUSSION

10 A. Opinion Evidence

11 Plaintiff contends the ALJ improperly rejected the opinions of Lynne Jahnke,
12 M.D., Kim Chupurdia, Ph.D., and Gary Gleason, D.O. ECF No. 16 at 9-13.

13 Plaintiff also contends the opinion of David Colvin, ARNP, is relevant evidence.

14 ECF No. 16 at 13.

15 For claims filed on or after March 27, 2017, new regulations changed the
16 framework for evaluation of medical opinion evidence. *Revisions to Rules*
17 *Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg.
18 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The regulations provide that the
19 ALJ will no longer “give any specific evidentiary weight...to any medical
20 opinion(s)...” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68;
21 *see* 20 C.F.R. § 416.920c(a). Instead, an ALJ must consider and evaluate the
persuasiveness of all medical opinions or prior administrative medical findings from

1 medical sources. 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the
2 persuasiveness of medical opinions and prior administrative medical findings
3 include supportability, consistency, relationship with the claimant (including length
4 of the treatment, frequency of examinations, purpose of the treatment, extent of the
5 treatment, and the existence of an examination), specialization, and “other factors
6 that tend to support or contradict a medical opinion or prior administrative medical
7 finding” (including, but not limited to, “evidence showing a medical source has
8 familiarity with the other evidence in the claim or an understanding of our disability
9 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-(5).

10 Supportability and consistency are the most important factors, and therefore
11 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
12 416.920c(b)(2). With regard to supportability, “[t]he more relevant the objective
13 medical evidence and supporting explanations presented by a medical source are to
14 support his or her medical opinion(s) or prior administrative medical finding(s), the
15 more persuasive the medical opinions or prior administrative medical finding(s) will
16 be.” 20 C.F.R. § 416.920c(c)(1)-(2). With regard to consistency, “[t]he more
17 consistent a medical opinion(s) or prior administrative medical finding(s) is with the
18 evidence from other medical sources and nonmedical sources in the claim, the more
19 persuasive the medical opinion(s) or prior administrative medical finding(s) will be.”
20 20 C.F.R. § 416.920c(c)(1)-(2).

21 The ALJ may, but is not required, to explain how other factors were
considered. 20 C.F.R. § 416.920c(b)(2). However, when two or more medical

1 opinions or prior administrative findings “about the same issue are both equally
2 well-supported . . . and consistent with the record . . . but are not exactly the same,”
3 the ALJ is required to explain how “the other most persuasive factors in paragraphs
4 (c)(3) through (c)(5)” were considered. 20 C.F.R. § 416.920c(b)(3).

5 *I. Gary Gleason, D.O.*

6 Dr. Gleason began treating Plaintiff in November 2017 and completed a
7 Physical Residual Functional Capacity Questionnaire form in March 2018. Tr.
8 392, 446-49. Dr. Gleason diagnosed asthma and allergies and opined that
9 Plaintiff’s symptoms would cause frequent interference with attention and
10 concentration in performing simple work tasks. Tr. 447. Dr. Gleason opined that
11 Plaintiff could lift up to ten pounds, stand and walk for about four hours, and sit for
12 about six hours in a workday. Tr. 447. He also assessed environmental and
13 postural limitations and indicated that Plaintiff would miss four or more days of
14 work per month. Tr. 448-49.

15 The ALJ found that Dr. Gleason’s opinion is partially persuasive and that
16 some level of limitation is clearly indicated, but that Dr. Gleason overstated
17 Plaintiff’s functional limitations. Tr. 35. First, the ALJ found Dr. Gleason’s
18 opinion is not supported by analysis or citation to treatment notes supporting the
19 assessed limitations. Tr. 34. As noted *supra*, a medical opinion is more persuasive
20 when the source provides relevant objective medical evidence and supporting
21 explanations. 20 C.F.R. § 416.920c(c)(1)-(2). Indeed, Dr. Gleason’s opinion
contains no observations or objective findings and no explanation of the basis for

1 the limitations assessed. Without citing any authority or the record, Plaintiff
2 argues Dr. Gleason's treatment notes provide support for the opinion. However,
3 the ALJ addressed Dr. Gleason's treatment notes and found they contain limited
4 exam findings which are more consistent with light exertion work than the
5 limitations he assessed. Tr. 34; *see* Tr. 450-56, 463-82. This finding is supported
6 by substantial evidence.

7 Second, the ALJ found Dr. Gleason's opinion is inconsistent with his own
8 findings and other evidence in the record. Tr. 34-35. A medical opinion is more
9 persuasive when it is consistent with evidence from other medical and nonmedical
10 sources. 20 C.F.R. § 416.920c(c)(1)-(2). As mentioned, *supra*, the ALJ observed
11 that Dr. Gleason's exam findings were limited and are more consistent with light
12 exertion work than with the limitations he assessed. Tr. 34; *see* Tr. 450-56, 463-
13 82. Additionally, the ALJ noted that Dr. Gleason indicated that Plaintiff's
14 symptoms "date back to early childhood," Tr. 449, which means that Plaintiff
15 worked at substantial gainful activity with those symptoms for many years. Tr. 34-
16 35; *see* Tr. 299-300. On reply, without citing the record, Plaintiff argues that even
17 though he was able to work for many years, "his symptoms were exacerbated by an
18 increase in allergies." ECF No. 18 at 10. However, the ALJ found that there is no
19 indication of a significant increase in symptomology. Tr. 33. Further, the ALJ
20 found that the opinions of Dr. Weir, whose opinion was "significantly persuasive,"
21 and Dr. Jahnke, whose opinion was "highly persuasive," are better supported and

1 more consistent with the entire record. Tr. 35. The ALJ's reasoning is supported
2 by substantial evidence.

3 2. *Lynne Jahnke, M.D.*

4 Dr. Jahnke, the medical expert, testified that Plaintiff has severe impairments
5 of asthma and chronic sinusitis. Tr. 93-94. She opined Plaintiff could lift up to 10
6 pounds frequently and 20 pounds occasionally; has no limitations on standing or
7 walking; could occasionally climb stairs and ramps but never climb ladders or
8 scaffolds; should avoid unprotected heights; and should avoid exposure to dust,
9 odors, fumes, humidity, and pulmonary irritants. Tr. 95-96.

10 As noted *supra*, the ALJ found Dr. Jahnke's testimony to be highly
11 persuasive. Tr. 34. The ALJ found that notwithstanding Dr. Jahnke's opinion that
12 Plaintiff's lumbar spondylitis and digestive problems are not severe impairments,
13 Tr. 94-95, when viewing the evidence in the light most favorable to Plaintiff, there
14 are sufficient limitations from those conditions to be found severe. Tr. 34. The
15 ALJ noted that Dr. Jahnke's testimony that Plaintiff could perform a range of light
16 work formed the basis for and is generally consistent with the RFC finding. Tr. 34,
17 95-96.

18 Plaintiff contends that despite giving significant weight to Dr. Jahnke's
19 opinion, the ALJ "improperly rejected" it by omitting some of the limitations
20 assessed from the RFC. ECF No. 16 at 9. During cross-examination, Dr. Jahnke
21 was asked about Dr. Gleason's opinion that Plaintiff's attention and concentration
would be frequently interrupted, and he would need four ten-minute breaks per

1 day. Dr. Jahnke testified that, “With allergies, sinusitis, and asthma, he just feels
2 miserable. The [treating] doctor is more sensitive to that than I can be objectively”
3 Tr. 99. Counsel then stated, “So if he is miserable, he is likely to not feel well and
4 be off task and not able to concentrate,” and Dr. Jahnke responded by saying,
5 “[y]es, good point.” Tr. 99. Dr. Jahnke was also asked about Dr. Gleason’s
6 opinion that Plaintiff would miss four or more days of work per month. Tr. 99.
7 Dr. Jahnke testified, “I do not have a sense of that on the record. . . . So I think he
8 may miss several days a month but I would trust his primary doctor’s assessment
9 of that.”³ Tr. 99-100.

10 Plaintiff contends this testimony indicates additional limitations not addressed
11 by the ALJ in evaluating Dr. Jahnke’s opinion. ECF No. 16 at 9-10. However, this
12 argument fails for several reasons. First, Dr. Jahnke’s statements do not constitute
13 an assessment of functional limitations. The ALJ is not required to incorporate
14 limitations phrased equivocally into the RFC. *Id.*; *Glosenger v. Comm’r of Soc. Sec.*
15 *Admin.*, 2014 WL 1513995 at *6 (D. Or. April 16, 2014) (affirming the ALJ’s
16 rejection of limitations prefaced with language such as “might,” “may,” or “would
17 also likely require”). Statements including such language may be excluded by an
18 ALJ because they are not diagnoses or descriptions of a plaintiff’s functional

19
20 ³ On reply, Plaintiff takes Dr. Janke’s testimony out of context which makes it
21 appear less equivocal than it is. ECF No. 18 at 10.

1 capacity. *See Valentine*, 574 F.3d at 691-92. Dr. Jahnke's statements regarding
2 attention and concentration and missing work were responses to questions about Dr.
3 Gleason's opinion and suggest that she did not see support for those limitations in
4 the record, so she would defer to the treating physician. This does constitute
5 additional limitations assessed by Dr. Jahnke and the ALJ properly excluded them.

6 Further, as discussed *supra*, Dr. Gleason's opinion was properly found to be
7 less persuasive because it overstates the limitations supported by the record.

8 Lastly, with regard to concentration and attention, the ALJ made a properly
9 supported finding which is not challenged by Plaintiff that Plaintiff has no
10 limitation in concentration, persistence, and pace. Tr. 31. For these reasons, the
11 ALJ's consideration of Dr. Jahnke's opinion is supported by substantial evidence.

12 3. *Kim Chupurdia, Ph.D.*

13 Dr. Chupurdia examined Plaintiff and prepared a mental evaluation report in
14 February 2018. Tr. 431-44. She diagnosed dysthymia and anxiety disorder, not
15 otherwise specified. Tr. 434. Dr. Chupurdia opined that Plaintiff has the ability to
16 reason and understand, has some adaptation skills, can concentrate and persist, and
17 has intact memory. Tr. 434. She noted that Plaintiff reports difficulty following
18 through on tasks at home and difficulty in a work environment. Tr. 434. Dr.
19 Chupurdia found moderate impairment in Plaintiff's ability to interact with
20 coworkers and the public based on anxiety over possible physical symptoms; in the
21 ability to maintain regular attendance due to Plaintiff's mood symptoms and
tendency to isolate himself from others; in the ability to maintain a normal

1 workday and workweek without interruption from mood symptoms; and in the
2 ability to deal with stress in the workplace if it involves leaving his home and
3 being around other people. Tr. 434.

4 First, the ALJ found Dr. Chupurdia's opinion is not persuasive because it is
5 not consistent with her own evaluation. Tr. 34. A medical opinion is more
6 persuasive when the source provides relevant objective medical evidence and
7 supporting explanations. 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ observed that
8 Dr. Chupurdia found Plaintiff had no ongoing mental health treatment, had normal
9 thought content, stream of thought, orientation, memory, fund of knowledge,
10 concentration, abstract thinking, insight, and judgment. Tr. 34, 433-34. The ALJ
11 found that Dr. Chupurdia appeared to rely on Plaintiff's subjective allegations
12 rather than objective or observational findings and that a portion of the functional
13 assessment involves Plaintiff's description of symptoms rather than her findings.
14 Tr. 34, 434.

15 Plaintiff contends the ALJ did not explain the basis for this finding. ECF
16 No. 16 at 10. However, the ALJ's explanation that Dr. Chupurdia's functional
17 assessment includes some of Plaintiff's description of symptoms rather than her
18 opinion is supported by the record. Dr. Chupurdia's functional assessment
19 includes phrases such as, "[t]he claimant describes a great deal of difficulty" and
20 "[h]e describes" which indicates that the resultant limitations assessed arise from
21 Plaintiff's own statements. Tr. 434. Furthermore, the ALJ also cited the benign
objective and observational findings in the mental status exam as another basis for

1 concluding that the opinion is unsupported and is therefore less persuasive. Tr. 34,
2 433.

3 Second, the ALJ found Dr. Chupurdia's opinion is not persuasive because it
4 directly conflicts with Plaintiff's testimony that he is not significantly limited by
5 mental health problems. Tr. 34. A medical opinion is more persuasive when it is
6 consistent with evidence from other medical and nonmedical sources. 20 C.F.R. §
7 416.920c(c)(1)-(2). Plaintiff testified that he was not seeking mental health
8 treatment or taking any medication for anxiety or depression and that "stress is a
9 factor for my issues . . . [b]ut I would not call mental impairment being a factor."
10 Tr. 114. Plaintiff contends this statement "is a factor consistent with an attempt to
11 avoid a mental health stigma," ECF No. 16 at 11, but Plaintiff does not cite any
12 support for this assumption in the record and the court finds none.

13 Additionally, the ALJ found Dr. Chupurdia's opinion is unsupported by the
14 overall record. Tr. 34. The ALJ discussed the mental health evidence, or lack
15 thereof, in detail in finding that Plaintiff does not have a severe mental health
16 impairment, a finding that is not challenged by Plaintiff. Tr. 30-31. The ALJ's
17 reasonably found Dr. Chupurdia's opinion conflicts with other evidence in the
18 record, and this is a legitimate reason for finding the opinion less persuasive.

19 4. *David Colvin, ARNP*

20 Plaintiff contends a May 4, 2020, opinion from David Colvin, ARNP is
21 relevant evidence. ECF No. 16 at 13. This opinion was first submitted to the
Appeals Council and was not part of the record before the ALJ. *See* Tr. 2.

1 Pursuant to 20 C.F.R. § 416.1470(a)(5), the Appeals Council will review a case at
2 a party's request or on its own motion when it "receives additional evidence that is
3 new, material, and relates to the period on or before the date of the hearing
4 decision, and there is a reasonable probability that the additional evidence would
5 change the outcome of the decision." The Appeals Council declined review of the
6 ALJ's decision and found that Mr. Colvin's opinion does not relate to the relevant
7 period because it is dated after April 23, 2019, the date of the ALJ's decision. Tr.
8 2.

9 When the Appeals Council declines review, the ALJ's decision becomes the
10 final decision of the Commissioner, and the district court reviews that decision for
11 substantial evidence, based on the record as a whole. *Brewes v. Comm'r of Soc.*
12 *Sec. Admin.*, 682 F.3d 1157, 1161-62 (9th Cir. 2012) (citation omitted). When the
13 Appeals Council considers new evidence in deciding whether to review a decision
14 of the ALJ, that evidence becomes part of the administrative record, which the
15 district court must consider when reviewing the Commissioner's final decision for
16 substantial evidence. *Id.* at 1163. Here, the Appeals Council did not consider the
17 evidence except to determine that it does not relate to the period at issue and did
18 not add it as an exhibit in the administrative record. Tr. 5-6; *see Bales v. Berryhill*,
19 688 F. App'x. 495, 496 (9th Cir. 2017) (unpublished) (determining that when the
20 Appeals Council found that the new medical records did not "relate to the period
21 on or before the date of the administrative law judge hearing decision," and did
not, therefore consider these records, the records did not become part of the

1 administrative record); *Ruth v. Berryhill*, No. 1:16–CV–0872–PK, 2017 WL
2 4855400 (D. Or. Oct. 26, 2017) (citing other district court decisions in the Ninth
3 Circuit holding that that new evidence that the Appeals Council looked at and then
4 rejected did not become part of the administrative record subject to the Court’s
5 substantial evidence review).

6 To the extent Petitioner disagrees with the reason the Appeals Council
7 provided for refusing to consider and exhibit the newly submitted evidence,
8 Plaintiff should have requested a remand for the ALJ to consider the new
9 evidence. *See Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1233 (9th
10 Cir. 2011) (“Where the Appeals Council was required to consider additional
11 evidence, but failed to do so, remand to the ALJ is appropriate so that the ALJ can
12 reconsider its decision in light of the additional evidence.”); *see also* 42 U.S.C. §
13 405(g) (permitting a court to remand a case “upon a showing that there is new
14 evidence which is material and that there is good cause for the failure to
15 incorporate such evidence into the record in a prior proceeding”). However,
16 Plaintiff has not cited any authority, made any such argument, or requested such
17 relief. ECF No. 16 at 13, 19.

18 Plaintiff simply argues the opinion is relevant because Mr. Colvin indicated
19 the symptoms and limitations described had existed since 2012. ECF No. 16 at 13.
20 However, the records submitted with Mr. Colvin’s opinion are dated December 13,
21 2019, and January 24, 2020. They indicate no findings, objective or observational,
supporting the level of limitations assessed by Mr. Colvin and do not reflect that he

1 reviewed any records supporting the conclusion that such limitations existed since
2 2012. Tr. 13-15, 18. Furthermore, Plaintiff offers no reason to believe the ALJ,
3 having already found his symptoms were not as severe as alleged, would have
4 adopted a retroactive opinion based essentially on Plaintiff's self-report that the
5 symptoms and limitations assessed by Mr. Colvin existed since 2012. Thus, ALJ's
6 RFC determination based on the hearing testimony, the medical record, and the
7 medical opinions is supported by substantial evidence without regard to Mr.
8 Colvin's opinion.

9 **B. Symptom Testimony**

10 Plaintiff contends the ALJ erred by rejecting his symptom testimony. ECF
11 No. 16 at 13-16. An ALJ engages in a two-step analysis to determine whether a
12 claimant's testimony regarding subjective pain or symptoms is credible. "First, the
13 ALJ must determine whether there is objective medical evidence of an underlying
14 impairment which could reasonably be expected to produce the pain or other
15 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
16 "The claimant is not required to show that her impairment could reasonably be
17 expected to cause the severity of the symptom she has alleged; she need only show
18 that it could reasonably have caused some degree of the symptom." *Vasquez v.*
19 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

20 Second, "[i]f the claimant meets the first test and there is no evidence of
21 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

1 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
2 citations and quotations omitted). “General findings are insufficient; rather, the
3 ALJ must identify what testimony is not credible and what evidence undermines
4 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
5 Cir. 1995)); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)
6 (“[T]he ALJ must make a credibility determination with findings sufficiently
7 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
8 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most
9 demanding required in Social Security cases.” *Garrison*, 759 F.3d 995, 1015 (9th
10 Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th
11 Cir. 2002)). In assessing a claimant’s symptom complaints, the ALJ may consider,
12 *inter alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
13 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s
14 daily living activities; (4) the claimant’s work record; and (5) testimony from
15 physicians or third parties concerning the nature, severity, and effect of the
16 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

17 First, the ALJ found the objective record lacks findings consistent with the
18 level of limitations alleged. Tr. 33. An ALJ may not discredit a claimant’s pain
19 testimony and deny benefits solely because the degree of pain alleged is not
20 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857
21 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*
Bowen, 885 F.2d 597, 601 (9th Cir. 1989). However, the medical evidence is a

1 relevant factor in determining the severity of a claimant's pain and its disabling
2 effects. *Rollins*, 261 F.3d at 857. Minimal objective evidence is a factor which
3 may be relied upon in discrediting a claimant's testimony, although it may not be
4 the only factor. *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). The
5 ALJ observed that despite the allegation of disabling asthma and allergies,
6 Plaintiff's respiration was normal at multiple visits in the limited record. Tr. 33
7 (citing 383, 389, 408, 412, 415, 425, 443, 453, 464, 467, 469, 475). The ALJ
8 noted some abnormal findings, Tr. 33 (citing Tr. 391, 417), but found they do not
9 demonstrate persistence and consistency of symptoms across the record. Tr. 33.
10 The ALJ also noted spirometry testing suggested only possible early obstructive
11 pulmonary impairment and mild dysfunction. Tr. 33 (citing Tr. 373, 430).

12 With respect to Plaintiff's back impairment, the ALJ noted Plaintiff
13 demonstrated normal gait, station, range of motion of the lumbar spine, and had
14 negative straight leg raise testing on examinations. Tr. 33 (citing Tr. 383, 408,
15 425, 443-44). The ALJ found that although Plaintiff was noted to use a cane on
16 occasion, there is no evidence Plaintiff's use of a cane is medically necessary. Tr.
17 33, 431, 448; *see Chaudry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012) (holding
18 ALJ need not provide for use of an assistive device in the RFC if there is no
19 evidence it is medically necessary).⁴ Regarding Plaintiff's digestive symptoms, the

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21 ⁴ Plaintiff cites a December 30, 2019, record from David Colvin ARNP, to support
the use of a cane. ECF No. 16 at 16 (citing Tr. 9). However, for the same reasons

1 ALJ found that Plaintiff received treatment and reported “minor episodes” about
2 once every three months since he changed his diet. Tr. 33 (citing Tr. 375). The
3 records cited by the ALJ support the conclusion that the observational and
4 objective record lacks findings consistent with the level of limitation alleged.
5 Plaintiff asserts that the “often-benign findings in the record were consistent with
6 the claimant’s inability to see the doctor on bad or even moderate days, when his
7 symptoms prevented him from leaving his house or his bathroom.” ECF No. 16 at
8 15. This assertion is not supported by the record and there is no objective evidence
9 supporting symptoms of that degree.

10 Second, the ALJ found there is very little treatment documented for
11 Plaintiff’s physical complaints and virtually no treatment for his mental health
12 complaints. Tr. 33. Medical treatment received to relieve pain or other symptoms
13 is a relevant factor in evaluating pain testimony. 20 C.F.R. § 416.929(c)(3)(iv)-(v).
14 The ALJ is permitted to consider the claimant’s lack of treatment in evaluating
15 symptom claims. *Burch*, 400 F.3d at 681. The ALJ found the lack of treatment
16 was unexpected given the severity of the symptoms alleged. Tr. 33. Plaintiff
17 contends Dr. Jahnke, the medical expert, indicated that the limited treatment record
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20 discussed *supra*, the Court concludes the record from Mr. Coleman does not
21 impact the ALJ’s finding.

1 is “because when he feels bad, he does not feel up to a visit with a doctor.” ECF
2 No. 16 at 15 (citing Tr. 100). However, Dr. Jahnke actually testified, “this
3 claimant does not go to the doctor a whole lot. . . . so I think when he feels bad [he
4 is] not going to see a doctor’s visit necessarily.” Tr. 100. Dr. Jahnke did not
5 suggest that Plaintiff is at times too ill to see a doctor, a proposition which has no
6 foundation in the medical record, and this does not reasonably explain the paucity
7 of medical treatment.

8 Plaintiff notes that where the evidence suggests lack of mental health
9 treatment is part of a claimant’s mental health condition, it may be inappropriate to
10 consider a claimant’s lack of mental health treatment as evidence of a lack of
11 credibility. ECF No. 16 at 15 (citing *Regennitter v. Comm’r of Soc. Sec. Admin.*,
12 166 F.3d 1294, 1299-1300 (9th Cir. 1999)); *see also Nguyen v. Chater*, 100 F.3d
13 1462, 1465 (9th Cir. 1996). Notwithstanding, when there is no evidence
14 suggesting a failure to seek treatment is attributable to a mental impairment rather
15 than personal preference, it is reasonable for the ALJ to conclude that the level or
16 frequency of treatment is inconsistent with the level of complaints. *Molina*, 674
17 F.3d at 1113-14. Here, as the ALJ observed, there is no mental health treatment in
18 the record. Tr. 33. There is no evidence that any failure to seek treatment is
19 attributable to a mental impairment. Furthermore, Plaintiff did not challenge the
20 ALJ’s finding that Plaintiff’s medically determinable mental impairments are
21 nonsevere. Tr. 30-31. The ALJ’s finding is reasonable and this is a clear and
convincing reason supported by substantial evidence.

1 Third, the ALJ found Plaintiff worked in the past with his most limiting
2 condition. Tr. 33. The claimant's work record is an appropriate consideration in
3 weighing the claimant's symptom complaints. *Thomas*, 278 F.3d at 958-59. The
4 ALJ noted that Plaintiff's most limiting condition is purportedly asthma but
5 observed that Plaintiff has had asthma his entire life and was able to work
6 consistently through 2009. Tr. 33 (citing Tr. 299-300). Without citing the record,
7 Plaintiff claims his asthma has been exacerbated by allergies in recent years and
8 that the combination of his asthma and his more recently developed gastrointestinal
9 condition prevent him from working. ECF No. 16 at 16. As the ALJ pointed out,
10 however, that there is no indication of a significant increase in symptomology,
11 which makes the alleged inability to work due to asthma less persuasive. Tr. 33.
12 This is a clear and convincing reason supported by substantial evidence.

13 C. Step Four

14 Plaintiff also contends the ALJ erred at step four by failing to identify the
15 specific demands of Plaintiff's past relevant work and by failing to properly compare
16 the specific demands of Plaintiff's past work and her functional limitations. ECF
17 No. 16 at 16-19. The regulations provide, "[a]t the fourth step, we consider our
18 assessment of your residual functional capacity and your past relevant work. If you
19 can still do your past relevant work, we will find that you are not disabled." 20
20 C.F.R. § 416.920(a)(4)(iv). The burden of proof lies with the Plaintiff at step four,
21 but the ALJ still has a duty to make the requisite factual findings to support his

1 conclusions. *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001); *see also* SSR
2 82-62 (1982) at *4, *available at* 1982 WL 31386.

3 The ALJ must make the following specific findings of fact: (1) a finding of
4 fact as to the individual's RFC; (2) a finding of fact as to the physical and mental
5 demands of the past job/occupation; and (3) a finding of fact that the individual's
6 RFC would permit a return to his or her past job or occupation. SSR 82-62 at *4.

7 Here, the ALJ first found Plaintiff has the RFC to perform light work, except
8 that he can sit up to eight hours and stand or walk at least six hours of an eight-hour
9 workday with normal breaks, must avoid climbing ladders, ropes, or scaffolds, can
10 occasionally climb ramps or stairs, can occasionally stoop, kneel, crouch, crawl, and
11 balance, must avoid unprotected heights and hazardous machinery, concentrated
12 exposure to wetness and humidity, and must avoid all exposure to respiratory
13 irritants such as industrial fumes, odors, dusts, gasses, and poorly ventilated areas.

14 Tr. 32. Second, based on the testimony of the vocational expert, the ALJ found that
15 Plaintiff's past relevant work as a CAD/CAM drafter was classified as SVP 5,
16 exertionally light, skilled, as generally performed under the relevant regulations.⁵
17 Tr. 35-36; *see* 20 C.F.R. § 416.967(b)-(c). Third, based on the vocational expert's
18 testimony, the ALJ found that Plaintiff's RFC allowed him to perform his past
19 relevant work as a CAD/CAM draft as generally performed in the national economy.

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21 ⁵ Social Security regulations classify work by physical exertion requirements and
skill requirements. 20 C.F.R. § 416.967.

1 Tr. 36. The ALJ's findings were therefore consistent with the requirements of
2 S.S.R. 82-62.⁶

3 The ALJ's findings at step four are supported by substantial evidence and are
4 legally sufficient. Moreover, even assuming, *arguendo*, that the ALJ erred at step
5 four; any error would be harmless because at step five the ALJ properly found that,
6 alternatively, there are other jobs that existed in significant numbers in the national
7 economy that Plaintiff could perform, including: routing clerk, mail clerk, and

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⁶ Plaintiff cites *Pinto* and asserts the ALJ "allowed the remainder of the RFC
10 assessment to take place solely in the vocational expert's head." ECF No. 16 at
11 17-18, citing 249 F.3d 840. However, the ALJ in *Pinto* made findings which
12 deviated from the Dictionary of Occupational Titles without explanation and failed
13 to make specific findings of fact about the claimant's abilities. 249 F.3d at 847. In
14 this case, the vocational expert testified that she would identify any testimony
15 which deviated from the DOT, but no such deviation was indicated. Tr. 120, 129-
16 30. The ALJ also found the vocational expert's testimony was not inconsistent
17 with the DOT. Tr. 36. As a result, the vocational expert made no assessment "in
18 her head" which is not verifiable by consulting the DOT. Plaintiff does not
19 identify any testimony or finding that is in fact inconsistent with the DOT. The
20 ALJ made the requisite findings of fact with sufficient specificity for the Court to
21 review.

1 photocopy machine operator. Tr. 36-37; *see Tommasetti v. Astrue*, 533 F.3d 1035,
2 1042 (9th Cir. 2008).

3 Plaintiff also argues the ALJ erred because the vocational expert's opinion
4 was based on an incomplete hypothetical. ECF No. 16 at 18. The ALJ's
5 hypothetical must be based on medical assumptions supported by substantial
6 evidence in the record which reflect all of a claimant's limitations. *Osenbrook v.*
7 *Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate,
8 detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101. The
9 ALJ is not bound to accept as true the restrictions presented in a hypothetical
10 question propounded by a claimant's counsel. *Osenbrook*, 240 F.3d at 1164;
11 *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*,
12 807 F.2d 771, 773 (9th Cir. 1986). The ALJ is free to accept or reject these
13 restrictions as long as they are supported by substantial evidence, even when there
14 is conflicting medical evidence. *Magallanes*, 881 F.2d at *id.*

15 Plaintiff's argument assumes that the ALJ erred in considering the medical
16 opinion evidence. ECF No. 16 at 18-19. The ALJ's consideration of the medical
17 opinion evidence was legally sufficient and supported by substantial evidence,
18 discussed *supra*. The ALJ therefore properly excluded limitations assessed by those
19 providers whose opinions were less persuasive from the RFC and hypothetical to the
20 vocational expert. The hypothetical contained the limitations the ALJ found credible
21 and supported by substantial evidence in the record. The ALJ's reliance on

1 testimony the VE gave in response to the hypothetical was therefore proper. *See id.*;
2 *Bayliss v. Barnhart*, 427 F. 3d 1211, 1217-18 (9th Cir. 2005).

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, this Court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly,

7 1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is DENIED.

8 2. Defendant's Motion for Summary Judgment, ECF No. 17, is GRANTED.

9 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
10 and provide copies to counsel. Judgment shall be entered for Defendant and the file
11 shall be **CLOSED**.

12 **DATED** October 18, 2021.

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LONNY R. SUKO
15 Senior United States District Judge
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