

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

Mar 31, 2022

SEAN F. McAVOY, CLERK

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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 PHILLIP D.,¹

8 Plaintiff,

9 vs.

10 KILOLO KIJAKAZI, ACTING
11 COMMISSIONER OF SOCIAL
SECURITY,²

12 Defendant.

No. 2:20-cv-00309-MKD

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

ECF Nos. 19, 20

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14 _____
15 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
16 identifies them by only their first names and the initial of their last names. *See*
LCivR 5.2(c).

17 ² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9,
18 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo
19 Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further
20 action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 19, 20. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court denies
4 Plaintiff's motion, ECF No. 19, and grants Defendant's motion, ECF No. 20.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

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. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
5 416.920(a). Further, a district court “may not reverse an ALJ’s decision on
6 account of an error that is harmless.” *Id.* An error is harmless “where it is
7 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
8 (quotation and citation omitted). The party appealing the ALJ’s decision generally
9 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
10 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,] but cannot,
19 considering his age, education, and work experience, engage in any other kind of
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1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. *Id.*

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

10 **ALJ’S FINDINGS**

11 On June 2, 2017, Plaintiff applied for Title XVI supplemental security
12 income benefits alleging an amended disability onset date of May 20, 2016.³ Tr.
13 16, 102, 205-11. The application was denied initially, and on reconsideration. Tr.
14 123-26, 133-35. Plaintiff appeared before an administrative law judge (ALJ) on
15 February 14, 2019. Tr. 36-69. On March 12, 2019, the ALJ denied Plaintiff’s
16 claim. Tr. 13-35.

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19 ³ Plaintiff previously applied for Title XVI benefits on May 20, 2016, which was
20 denied initially on June 16, 2016, and not appealed. Tr. 16, 83-88.

1 At step one of the sequential evaluation process, the ALJ found Plaintiff has
2 not engaged in substantial gainful activity since May 20, 2016. Tr. 18. At step
3 two, the ALJ found that Plaintiff has the following severe impairments:
4 spondylosis and degenerative disc disease; non-insulin dependent diabetes
5 mellitus; scalp dermatitis; morbid obesity (BMI >40); depressive disorder;
6 antisocial personality disorder; and posttraumatic stress disorder (possible vs.
7 probable). Tr. 18-19.

8 At step three, the ALJ found Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals the severity of a listed
10 impairment. Tr. 21. The ALJ then concluded that Plaintiff has the RFC to perform
11 light work with the following limitations:

12 [Work] that does not require more than occasional climbing of ramps
13 and stairs, balancing, stooping, kneeling, crouching, or crawling, and
14 no climbing of ladders, ropes, or scaffolds. He is able to understand,
15 remember, and carry out both simple routine repetitive-type tasks and
16 semi-skilled tasks and instructions. He is able to maintain
17 concentration, persistence, and pace for two-hour intervals between
regularly scheduled breaks. He cannot do work that requires
judgment or decision making. He can have none to brief incidental
interaction with the public (i.e., very minimal), and interaction with
coworkers and with supervisors is limited to superficial (defined as
non-collaborative, no teamwork, no tandem task).

18 Tr. 23.

19 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 27. At
20 step five, the ALJ found that, considering Plaintiff's age, education, work

1 experience, RFC, and testimony from the vocational expert, there were jobs that
2 existed in significant numbers in the national economy that Plaintiff could perform,
3 such as cleaner, housekeeping; cafeteria attendant; and marker, price. Tr. 28.
4 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
5 Social Security Act, from the date of the application through the date of the
6 decision. *Id.*

7 On July 13, 2020, the Appeals Council denied review of the ALJ's decision,
8 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
9 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

10 ISSUES

11 Plaintiff seeks judicial review of the Commissioner's final decision denying
12 him supplemental security income benefits under Title XVI of the Social Security
13 Act. Plaintiff raises the following issues for review:

- 14 1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 15 2. Whether the ALJ properly evaluated the medical opinion evidence.

16 ECF No. 19 at 16.

17 DISCUSSION

18 A. Plaintiff's Symptom Claims

19 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
20 convincing in discrediting his symptom claims. ECF No. 19 at 17-19. An ALJ

1 engages in a two-step analysis to determine whether to discount a claimant's
2 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
3 "First, the ALJ must determine whether there is objective medical evidence of an
4 underlying impairment which could reasonably be expected to produce the pain or
5 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
6 "The claimant is not required to show that [the claimant's] impairment could
7 reasonably be expected to cause the severity of the symptom [the claimant] has
8 alleged; [the claimant] need only show that it could reasonably have caused some
9 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

10 Second, "[i]f the claimant meets the first test and there is no evidence of
11 malingering, the ALJ can only reject the claimant's testimony about the severity of
12 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
13 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
14 omitted). General findings are insufficient; rather, the ALJ must identify what
15 symptom claims are being discounted and what evidence undermines these claims.
16 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
17 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
18 explain why it discounted claimant's symptom claims)). "The clear and
19 convincing [evidence] standard is the most demanding required in Social Security
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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 Factors to be considered in evaluating the intensity, persistence, and limiting
4 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
5 duration, frequency, and intensity of pain or other symptoms; 3) factors that
6 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
7 side effects of any medication an individual takes or has taken to alleviate pain or
8 other symptoms; 5) treatment, other than medication, an individual receives or has
9 received for relief of pain or other symptoms; 6) any measures other than treatment
10 an individual uses or has used to relieve pain or other symptoms; and 7) any other
11 factors concerning an individual’s functional limitations and restrictions due to
12 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
13 416.929(c). The ALJ is instructed to “consider all of the evidence in an
14 individual’s record,” to “determine how symptoms limit ability to perform work-
15 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

16 The ALJ found that Plaintiff’s medically determinable impairments could
17 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s
18 statements concerning the intensity, persistence, and limiting effects of his
19 symptoms were not entirely consistent with the evidence. Tr. 24.

1 1. *Objective Medical Evidence*

2 The ALJ found Plaintiff's symptom claims were inconsistent with the
3 objective medical evidence. Tr. 24-25. An ALJ may not discredit a claimant's
4 symptom testimony and deny benefits solely because the degree of the symptoms
5 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261
6 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
7 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400
8 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a
9 relevant factor, along with the medical source's information about the claimant's
10 pain or other symptoms, in determining the severity of a claimant's symptoms and
11 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

12 First, the ALJ found Plaintiff's physical symptom complaints were
13 inconsistent with the objective evidence. Tr. 24-25. While Plaintiff alleges he has
14 left knee pain and grinding, Tr. 51, and 15 to 20 severe migraines per month, Tr.
15 53, the ALJ found there is no evidence to establish either condition is a medically
16 determinable impairment. Tr. 20-21, 24. Prior to the alleged onset date, Plaintiff
17 reported left knee pain and was diagnosed with patellofemoral pain of the left
18 knee, Tr. 344-45, and chondromalacia patella of the left knee, Tr. 430. Plaintiff
19 does not cite to any diagnoses nor abnormalities on examination related to
20 Plaintiff's left knee during the relevant time period. Plaintiff also cites to his self-

1 reported migraines but does not cite to any medical records related to his
2 migraines. ECF No. 19 at 4. There is evidence Plaintiff reported migraines in
3 May 2016, prior to the alleged onset date, Tr. 367, but later records note no history
4 of migraines, Tr. 1136, and there are no medical records during the relevant period
5 where Plaintiff reported numerous migraines per month nor any diagnosis of
6 migraines, Tr. 20-21. Plaintiff reports a back injury and flashbacks due to combat-
7 related events, but the VA found there was not evidence to support his claims. Tr.
8 24 (citing Tr. 354, 586, 830, 874). Plaintiff reports he needs to use a cane, but the
9 ALJ noted multiple records documenting a normal gait, although Plaintiff at other
10 time had gait abnormalities and/or used a cane. Tr. 25 (citing Tr. 893, 930, 1194-
11 95, 1227-28); Tr. 1002. As discussed *infra*, Plaintiff has also reported
12 improvement in his pain with treatment. Plaintiff does not set forth any argument
13 as to how the objective medical evidence is consistent with his allegations of
14 disabling physical limitations, and only generally summarizes the physical
15 evidence earlier in the motion. *See* ECF No. 19.

16 Second, the ALJ found Plaintiff's mental health symptom complaints were
17 inconsistent with the evidence. Tr. 25. Plaintiff has generally denied depressive
18 symptoms or not reported any symptoms at most appointments. *Id.* (citing Tr.
19 1089, 1147, 1236, 1249). Plaintiff has generally been observed as having normal
20 mood and affect. Tr. 25 (citing Tr. 833-34, 845, 850, 853). While Plaintiff argues

1 the ALJ erred in rejecting his claims as inconsistent with the objective evidence,
2 ECF No. 19 at 17, Plaintiff does not set forth any argument as to how his claims
3 are consistent with the evidence. Earlier in the motion, Plaintiff largely restates his
4 own reported symptoms. Plaintiff cites to a psychological examination, ECF No.
5 19 at 6, however, the examination took place prior to the alleged onset date, and
6 Plaintiff had normal appearance, demeanor, eye contact, movement, behavior,
7 thoughts, perception, activity, mood, and affect during the examination, though he
8 spoke loudly on occasion and had only fair insight/judgment and impulse control,
9 Tr. 332. Plaintiff cites to multiple other examinations that took place more than
10 two years prior to the alleged onset date. ECF No. 19 at 8. At a 2017 examination,
11 Plaintiff had normal appearance, speech, attitude/behavior, thoughts, orientation,
12 perception, fund of knowledge, concentration, abstract thought, and
13 insight/judgment, though he had abnormal memory and anxious/depressed mood
14 and constricted affect. Tr. 833-35. On this record, the ALJ reasonably found
15 Plaintiff's symptom allegations were inconsistent with the objective medical
16 evidence. This was a clear and convincing reason, along with the other reasons
17 offered, to reject Plaintiff's symptom claims.

18 *2. Improvement with Treatment*

19 The ALJ found Plaintiff's symptom claims were inconsistent with Plaintiff's
20 improvement with treatment. Tr. 25. The effectiveness of treatment is a relevant

1 factor in determining the severity of a claimant's symptoms. 20 C.F.R. §
2 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006
3 (9th Cir. 2006) (determining that conditions effectively controlled with medication
4 are not disabling for purposes of determining eligibility for benefits); *Tommasetti*
5 *v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing that a favorable
6 response to treatment can undermine a claimant's complaints of debilitating pain or
7 other severe limitations).

8 The ALJ noted that Plaintiff reported good relief from his back pain with
9 ibuprofen, Flexeril, and tramadol. Tr. 25 (citing Tr. 607). Plaintiff also reported
10 improvement with chiropractic care. Tr. 25 (citing Tr. 582, 584, 854,). Plaintiff
11 reported improvement in his ability to perform his activities of daily living. Tr. 25
12 (citing Tr. 1280). Plaintiff's chiropractor noted Plaintiff had moderate
13 improvement with treatment, and he was progressing as expected. Tr. 571, 573.
14 Plaintiff argues the ALJ should not have looked at isolated periods of improvement
15 but the argument addresses Plaintiff's psychological functioning, ECF No. 19 at
16 18, and Plaintiff does not set forth an argument regarding how Plaintiff's physical
17 symptoms did not have improvement with treatment. The ALJ reasonably found
18 Plaintiff's allegations were inconsistent with the objective evidence. This was a
19 clear and convincing reason, supported by substantial evidence, to reject Plaintiff's
20 symptom claims.

1 3. *Activities of Daily Living*

2 The ALJ found Plaintiff's symptom claims were inconsistent with his
3 activities of daily living. Tr. 25. The ALJ may consider a claimant's activities that
4 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a
5 substantial part of the day engaged in pursuits involving the performance of
6 exertional or non-exertional functions, the ALJ may find these activities
7 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
8 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to
9 be eligible for benefits, the ALJ may discount a claimant's symptom claims when
10 the claimant reports participation in everyday activities indicating capacities that
11 are transferable to a work setting" or when activities "contradict claims of a totally
12 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

13 While Plaintiff alleges disabling physical limitations, Plaintiff reported being
14 active with his dog, hiking, hunting, lifting weights, caring for his dog, performing
15 household chores, and preparing meals. Tr. 25 (citing Tr. 607, 831, 1280).

16 Plaintiff reported having no issues with his personal care, not needing reminders,
17 and being able to handle money. Tr. 265-67. Despite some reported difficulties
18 with the tasks, Plaintiff reported he can do laundry and dishes, and take out the
19 garbage. Tr. 266-67. Plaintiff reported he plays video games, watches movies,
20 and reads daily, and does these things "very well." Tr. 268. Plaintiff stated he can

1 walk five blocks before needing a 10 to 15 minute break, sit for up to an hour,
2 stand for 30 to 45 minutes, and lift up to five pounds. Tr. 269. These reported
3 abilities are inconsistent with Plaintiff's allegations that he can walk no more than
4 a couple of blocks without a walker, that he can walk only 80 feet without a cane,
5 and that he spends most of his day laying down. Tr. 51, 54-55, 60. Plaintiff does
6 not challenge this reason, thus any argument is waived. *See Independent Towers v.*
7 *Washington*, 350 F.3d 925, 929 (9th Cir. 2003). The ALJ reasonably found
8 Plaintiff's activities of daily are inconsistent with his symptom claims. This was a
9 clear and convincing reason, supported by substantial evidence, to reject Plaintiff's
10 symptom claims.

11 4. *Work History*

12 The ALJ found Plaintiff's symptom claims were inconsistent with his work
13 history. Tr. 25. Evidence of a poor work history that suggests a claimant is not
14 motivated to work is a permissible reason to discredit a claimant's testimony that
15 she is unable to work. *Thomas*, 278 F.3d at 959; SSR 96-7 (factors to consider in
16 evaluating credibility include "prior work record and efforts to work"); *Smolen v.*
17 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); 20 C.F.R. § 416.929 (work record can
18 be considered in assessing credibility).

19 The ALJ noted that Plaintiff has never worked at a level that amounted to
20 substantial gainful activity, which raises the question of whether Plaintiff's

1 continued unemployment is due to his medical impairments. Tr. 25. While
2 Plaintiff reports he earned \$4800 per month in the Marine Corps from 2000
3 through 2005, Tr. 255-57, and the VA confirmed Plaintiff was in the Marine Corps
4 December 2001 to January 2005, Tr. 355, there is no documentation of earnings
5 from the United States Marine Corps. Although Plaintiff reports deploying for a
6 total of two years, Tr. 879, the VA could not confirm his deployments and noted
7 Plaintiff reported inconsistent information and it was “extremely unusual” Plaintiff
8 could not recall the forward operating base or combat outposts he was reportedly
9 assigned to, Tr. 871-72, 879. Plaintiff received payments from businesses located
10 in the United States during the time period he reported he was deployed in the
11 Middle East; as such, the case was referred for potential investigation for
12 attempting to fraudulently obtain monetary benefits. Tr. 78-79. Plaintiff also
13 reported going to prison for seven years, and then being on probation for a past
14 crime, and being on probation for another crime in 2017. Tr. 879. The ALJ
15 reasonably found Plaintiff’s work history indicates Plaintiff’s continued
16 unemployment may be for reasons other than his impairments.

17 The ALJ also noted Plaintiff asked his chiropractor whether he could work
18 as a landscaper, and his chiropractor said yes, and such activity would help his
19 body. Tr. 25 (citing Tr. 584). Plaintiff’s own perception of his ability to work is a
20 proper consideration in determining credibility. *See Barnes v. Comm’r of Soc.*

1 *Sec.*, No. 2:16-cv-00402-MKD, 2018 WL 545722 (E.D. Wash. Jan. 24, 2018)
2 (“Evidence of Plaintiff’s preparedness to return to work, even if an optimistic self-
3 assessment, is significant to the extent that the Plaintiff is willing and able to work,
4 as that belief indicates her allegation of symptoms precluding work are not
5 credible.”). Plaintiff does not challenge this reason, thus any argument is waived.
6 *See Independent Towers*, 350 F.3d at 929. The ALJ reasonably found Plaintiff’s
7 inquiry into his ability to perform a physically demanding job is inconsistent with
8 his allegations of disabling physical impairments that cause him to spend most of
9 his days in bed. This was a clear and convincing reason, supported by substantial
10 evidence, to reject Plaintiff’s symptom claims. Plaintiff is not entitled to remand
11 on these grounds.

12 **B. Medical Opinion Evidence**

13 Plaintiff contends the ALJ erred in her consideration of the opinions of
14 Plaintiff’s treating counselors; John Arnold, Ph.D.; and Nancy Winfrey, Ph.D.
15 ECF No. 19 at 19-20.

16 As an initial matter, for claims filed on or after March 27, 2017, new
17 regulations apply that change the framework for how an ALJ must evaluate
18 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*
19 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20
20 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give

1 any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*,
2 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §
3 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all
4 medical opinions or prior administrative medical findings from medical sources.
5 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of
6 medical opinions and prior administrative medical findings include supportability,
7 consistency, relationship with the claimant (including length of the treatment,
8 frequency of examinations, purpose of the treatment, extent of the treatment, and
9 the existence of an examination), specialization, and “other factors that tend to
10 support or contradict a medical opinion or prior administrative medical finding”
11 (including, but not limited to, “evidence showing a medical source has familiarity
12 with the other evidence in the claim or an understanding of our disability
13 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-
14 (5).

15 Supportability and consistency are the most important factors, and therefore
16 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
17 416.920c(b)(2). Supportability and consistency are explained in the regulations:

18 (1) *Supportability*. The more relevant the objective medical evidence
19 and supporting explanations presented by a medical source are to
20 support his or her medical opinion(s) or prior administrative
medical finding(s), the more persuasive the medical opinions or
prior administrative medical finding(s) will be.

1 (2) *Consistency*. The more consistent a medical opinion(s) or prior
2 administrative medical finding(s) is with the evidence from other
3 medical sources and nonmedical sources in the claim, the more
4 persuasive the medical opinion(s) or prior administrative medical
5 finding(s) will be.

6 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
7 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
8 two or more medical opinions or prior administrative findings “about the same
9 issue are both equally well-supported ... and consistent with the record ... but are
10 not exactly the same,” the ALJ is required to explain how “the other most
11 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
12 § 416.920c(b)(3).

13 The parties disagree over whether Ninth Circuit case law continues to be
14 controlling in light of the amended regulations, specifically whether treating and
15 examining sources should be afforded more weight than non-examining, non-
16 treating sources. ECF No. 19 at 19; ECF No. 20 at 8-11. “It remains to be seen
17 whether the new regulations will meaningfully change how the Ninth Circuit
18 determines the adequacy of [an] ALJ’s reasoning and whether the Ninth Circuit
19 will continue to require that an ALJ provide ‘clear and convincing’ or ‘specific and
20 legitimate reasons’ in the analysis of medical opinions, or some variation of those
standards.” *Gary T. v. Saul*, No. EDCV 19-1066-KS, 2020 WL 3510871, at *3
(C.D. Cal. June 29, 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020

1 WL 1812233, at *3 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is
2 mindful that it must defer to the new regulations, even where they conflict with
3 prior judicial precedent, unless the prior judicial construction ‘follows from the
4 unambiguous terms of the statute and thus leaves no room for agency discretion.’”
5 *Gary T.*, 2020 WL 3510871, at *3 (citing *Nat’l Cable & Telecomms. Ass’n v.*
6 *Brand X Internet Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3
7 F.3d 563, 567-58 (2d Cir. 1993) (“New regulations at variance with prior judicial
8 precedents are upheld unless ‘they exceeded the Secretary’s authority [or] are
9 arbitrary and capricious.’”).

10 There is not a consensus among the district courts as to whether the “clear
11 and convincing” and “specific and legitimate” standards continue to apply. *See,*
12 *e.g., Kathleen G. v. Comm’r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash.
13 Nov. 10, 2020) (applying the specific and legitimate standard under the new
14 regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal.
15 Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*,
16 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new
17 regulations displace the treating physician rule and the new regulations control);
18 *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D.
19 Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and
20 legitimate nor clear and convincing standard). This Court has held that an ALJ did

1 not err in applying the new regulations over Ninth Circuit precedent, because the
2 result did not contravene the Administrative Procedure Act's requirement that
3 decisions include a statement of "findings and conclusions, and the reasons or basis
4 therefor, on all the material issues of fact, law, or discretion presented on the
5 record." See, e.g., *Jeremiah F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL
6 4071863, at *5 (E.D. Wash. Sept. 7, 2021). Nevertheless, it is not clear that the
7 Court's analysis in this matter would differ in any significant respect under the
8 specific and legitimate standard set forth in *Lester*, 81 F.3d at 830-31.

9 In the opening brief, Plaintiff argued the ALJ improperly rejected the
10 opinions of Plaintiff's treating counselors; John Arnold, Ph.D.; and Nancy
11 Winfrey, Ph.D. ECF No. 19 at 19-20. However, Plaintiff failed to identify any
12 opinions offered by counselors. Regarding Dr. Arnold's opinion, Plaintiff failed to
13 set forth arguments regarding any of the reasons the ALJ offered to reject the
14 opinion. Plaintiff argues the ALJ erred in giving more weight to nonexamining
15 sources over examining sources and argues the ALJ should not have found Dr.
16 Arnold's opinion was inconsistent with the evidence during periods of
17 improvement. ECF No. 19 at 18-20. However, Plaintiff does not cite to any
18 evidence to support the argument that the identified records were isolated periods
19 of improvement. Plaintiff also does not address the other reasons offered by the
20 ALJ to reject Dr. Arnold's opinion. Plaintiff argues Dr. Arnold's opinion was

1 more supportable than the other opinions but does not offer any reasons why Dr.
2 Arnold's opinion is more supportable. *Id.* at 19. In addition to making only the
3 most general assertions of error, Plaintiff fails to support those assertions with any
4 citations to the record in the opening brief. While Plaintiff summarized the
5 medical evidence earlier in the motion, Plaintiff failed to tie the evidence to the
6 arguments. Plaintiff also argues the ALJ erred in relying on the opinion of Dr.
7 Winfrey, because the expert rejected Dr. Arnold's opinion, but Plaintiff does not
8 offer any further analysis of the opinion and does not address any of the reasons
9 the ALJ gave that support finding Dr. Winfrey's opinion persuasive. *Id.* at 20.

10 In the brief discussion of the medical opinions, Plaintiff also misstates the
11 new medical opinion regulations, stating that the most important factor to
12 determine supportability are relationship with the claimant, frequency of
13 examinations, purpose of the treatment relationship, extent of the treatment
14 relationship, and the examining relationship. *Id.* at 19. However, the regulations
15 state supportability and consistency are the most important factors; the other
16 factors are independent of supportability and consistency, and there is no hierarchy
17 among the other factors, thus stating the other factors are the "most important" is
18 not consistent with the language of the regulation. 20 C.F.R. § 416.20c(c)(1)-(5).
19 Plaintiff's argument that the regulation does not apply to non-examining, non-
20 treating sources is also not supported by the language of the regulation. ECF No.

1 19 at 19; 20 C.F.R. § 416.920c; *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg.
2 5844, at 5867-68.

3 The court ordinarily will not consider matters on appeal that are not
4 specifically and distinctly argued in an appellant’s opening brief. *See Carmickle v.*
5 *Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2006). The Ninth
6 Circuit “has repeatedly admonished that [it] cannot ‘manufacture arguments for an
7 appellant.’” *Independent Towers*, 350 F.3d at 929 (quoting *Greenwood v. Fed.*
8 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994)). Rather, the Court will “review
9 only issues which are argued specifically and distinctly.” *Independent Towers*, 350
10 F.3d at 929. When a claim of error is not argued and explained, the argument is
11 waived. *See id.* at 929-30 (holding that party’s argument was waived because the
12 party made only a “bold assertion” of error, with “little if any analysis to assist the
13 court in evaluating its legal challenge”); *see also Hibbs v. Dep’t of Human Res.*,
14 273 F.3d 844, 873 n.34 (9th Cir. 2001) (finding an allegation of error was “too
15 undeveloped to be capable of assessment”).

16 Defendant argues Plaintiff did not challenge the ALJ’s assessment of the
17 relevant factors for each opinion. ECF No. 20 at 12. The Court agrees and finds
18 Plaintiff has waived any arguments regarding the medical opinions. An opening
19 brief must contain the Plaintiff’s contentions, the reasons for the contentions, and
20 citations to the authority and portions of the record on which Plaintiff relies. *See*

1 *Independent Towers*, 350 F.3d at 930. By failing to provide the reasons for his
2 contentions, failing to cite to any records that support his contentions, and
3 misstating the relevant regulation without any real application or analysis of the
4 regulation, Plaintiff waived the arguments.

5 The Court also notes Plaintiff's counsel has repeatedly filed opening briefs
6 with this Court in which he failed to adequately brief the arguments. *See, e.g.*,
7 *Lovina R. v. Comm'r of Soc. Sec. Admin.*, No. 2:17-cv-00271-FVS (E.D. Wash.
8 Sept. 25, 2018) (Report and recommendation, ECF No. 17 at 6-10) (Adopted Oct.
9 11, 2018); *Debbie L. v. Saul*, No. 2:20-cv-00034-MKD (E.D. Wash. Jan. 11, 2021)
10 (ECF No. 18 at 15, 23, 25-27); *Stanford R. v. Saul*, No. 2:18-cv-00113-SAB (E.D.
11 Wash. Mar. 20, 2019) (Report and recommendation, ECF No. 20 at 11, 19)
12 (Adopted April 11, 2019); *Timothy A. v. Saul*, No. 2:18-cv-00154-SAB (E.D.
13 Wash. Mar. 20, 2019) (Report and recommendation, ECF No. 20 at 8-10, 17)
14 (Adopted April 11, 2019); *Benjamin V.*, No. 2:18-cv-00159-SAB (E.D. Wash.
15 Mar. 27, 2019) (Report and recommendation, ECF No. 19 at 14, 17, 22-24)
16 (Adopted May 30, 2019); *Ezra B.*, No. 2:19-cv-00041-MKD (E.D. Wash. Oct. 15,
17 2019) (ECF No. 17 at 18-19); *Lonnie P. v. Saul*, No. 2:18-cv-00169-RMP (E.D.
18 Wash. Mar. 21, 2019) (Report and recommendation, ECF No. 17 at 13-18, 21-22)
19 (Adopted April 9, 2019); *Adriana R. v. Saul*, No. 2:20-cv-00261-MKD (E.D.
20 Wash. April 14, 2021) (ECF No. 21 at 9-10, 16); *Steven D. v. Kijakazi*, No. 2:20-

1 cv-00424-MKD (E.D. Wash. Feb. 1, 2022) (ECF No. 20 at 17-24). Plaintiff's
2 counsel has been repeatedly admonished for the inadequate briefing yet has
3 continued to make general arguments that he fails to develop with any specificity.
4 Given Plaintiff's waiver of the issue, the Court declines to address Plaintiff's
5 challenge to the ALJ's medical opinion analysis.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's findings, the Court concludes the
8 ALJ's decision is supported by substantial evidence and free of harmful legal error.
9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
11 Defendant and update the docket sheet.

12 2. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

13 3. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
14 **GRANTED**.

15 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

16 The District Court Executive is directed to file this Order, provide copies to
17 counsel, and **CLOSE THE FILE**.

18 DATED March 31, 2022.

19 *s/Mary K. Dimke*
20 MARY K. DIMKE
UNITED STATES DISTRICT JUDGE