

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

1
2 Jan 28, 2022
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4 SEAN F. MCVOY, CLERK
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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON
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10 TREY ANDREW S.¹,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL

14 SECURITY²,

15 Defendant.

16 No. 2:21-CV-00108-SAB

17 **ORDER GRANTING**
18 **PLAINTIFF'S MOTION FOR**
19 **SUMMARY JUDGMENT;**
20 **DENYING DEFENDANT'S**
21 **MOTION FOR SUMMARY**
22 **JUDGMENT**

23 Before the Court are Cross-Motions for Summary Judgment. ECF Nos. 17,

24 18. The motions were heard without oral argument. Plaintiff is represented by

25 Maren Miller Bam; Defendant is represented by Frederick Fripps and Timothy M.
26 Durkin.

27 Plaintiff brings this action seeking judicial review of the Commissioner of
28 Social Security's final decision denying his application for Supplemental Security
Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1382. After

1 Pursuant to the recommendation of the Committee on Court Administration and
2 Case Management of the Judicial Conference of the United States, Plaintiff's name
3 is partially redacted.

2 Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9,
3 2021.

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6 **JUDGMENT ~1**

1 reviewing the administrative record and briefs filed by the parties, the Court is now
 2 fully informed. For the reasons set forth below, the Court granting Plaintiff's
 3 Motion for Summary Judgment, ECF No. 17, and denying Defendant's Motion for
 4 Summary Judgment, ECF No. 18.

5 **I. Jurisdiction**

6 On October 4, 2018, Plaintiff filed an application for supplemental security
 7 income. He alleged disability beginning November 1, 2012.

8 Plaintiff's application was denied initially and on reconsideration. On
 9 August 13, 2019, Plaintiff requested a hearing before an Administrative Law Judge
 10 ("ALJ"). On July 16, 2020, Plaintiff appeared and testified by telephone before
 11 ALJ Maria Palachuk, who presided from Spokane, Washington. Plaintiff appeared
 12 and testified without the assistance of an attorney. Also appearing and testifying
 13 were Lynne Jahnke, M.D., and K. Diane Kramer. The ALJ issued a decision on
 14 August 13, 2020, finding that Plaintiff was not disabled.

15 Plaintiff requested review by the Appeals Council; the Appeals Council
 16 denied the request on February 4, 2021. The Appeals Council's denial of review
 17 makes the ALJ's decision the "final decision" of the Commissioner of Social
 18 Security, which this Court is permitted to review. 42 U.S.C. § 405(g),
 19 1383(c)(1)(3).

20 Plaintiff filed a timely appeal with the United States District Court for the
 21 Eastern District of Washington on March 8, 2021. ECF No. 1. The matter is before
 22 this Court pursuant to 42 U.S.C. § 405(g).

23 **II. Five-Step Sequential Evaluation Process**

24 The Social Security Act defines disability as the "inability to engage in any
 25 substantial gainful activity by reason of any medically determinable physical or
 26 mental impairment which can be expected to result in death or which has lasted or
 27 can be expected to last for a continuous period of not less than twelve months." 42
 28 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be

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1 under a disability only if their impairments are of such severity that the claimant is
2 not only unable to do their previous work, but cannot, considering claimant's age,
3 education, and work experiences, engage in any other substantial gainful work that
4 exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The
5 Commissioner has established a five-step sequential evaluation process to
6 determine whether a person is disabled in the statute. See 20 C.F.R. §§
7 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v).

8 **Step One:** Is the claimant engaged in substantial gainful activities? 20
9 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work
10 done for pay and requires compensation above the statutory minimum. *Keyes v.*
11 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
12 substantial activity, benefits are denied. 20 C.F.R. § 404.1520(b), 416.920(b). If
13 the claimant is not, the ALJ proceeds to step two.

14 **Step Two:** Does the claimant have a medically-severe impairment or
15 combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A
16 severe impairment is one that lasted or must be expected to last for at least 12
17 months and must be proven through objective medical evidence. *Id.* §§ 404.1509,
18 416.909. If the claimant does not have a severe impairment or combination of
19 impairments, the disability claim is denied. *Id.* § 404.1520(a)(4)(ii),
20 416.920(a)(4)(ii). If the impairment is severe, the evaluation proceeds to the third
21 step.

22 **Step Three:** Does the claimant's impairment meet or equal one of the listed
23 impairments acknowledged by the Commissioner to be so severe as to preclude
24 substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If
25 the impairment meets or equals one of the listed impairments, the claimant is
26 conclusively presumed to be disabled. 20 C.F.R. §§ 404.1520(d), 416.920(d). If the
27 impairment is not one conclusively presumed to be disabling, the evaluation
28 proceeds to the fourth step.

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1 Before considering to the fourth step, the ALJ must first determine the
 2 claimant's residual functional capacity. An individual's residual functional
 3 capacity is their ability to do physical and mental work activities on a sustained
 4 basis despite limitations from their impairments. 20 C.F.R. §§ 404.1545(a)(1),
 5 416.945(a)(1). The residual functional capacity is relevant to both the fourth and
 6 fifth steps of the analysis.

7 **Step Four:** Does the impairment prevent the claimant from performing work
 8 they have performed in the past? 20 C.F.R. §§ 404.1520(a)(4)(iv),
 9 416.920(a)(4)(iv). If the claimant is able to perform their previous work, they are
 10 not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant cannot perform
 11 this work, the evaluation proceeds to the fifth and final step.

12 **Step Five:** Is the claimant able to perform other work in the national
 13 economy in view of their age, education, and work experience? 20 C.F.R. §§
 14 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
 15 claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*
 16 v. *Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant
 17 establishes that a physical or mental impairment prevents him from engaging in her
 18 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to
 19 show that the claimant can perform other substantial gainful activity. *Id.*

20 III. Standard of Review

21 The Commissioner's determination will be set aside only when the ALJ's
 22 findings are based on legal error or are not supported by substantial evidence in the
 23 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
 24 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 25 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
 26 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
 27 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 28 to support a conclusion." *Richardson*, 402 U.S. at 401.

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1 A decision supported by substantial evidence will be set aside if the proper
 2 legal standards were not applied in weighing the evidence and making the decision.
 3 *Brawner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
 4 An ALJ is allowed “inconsequential” errors as long as they are immaterial to the
 5 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
 6 1050, 1055 (9th Cir. 2006). The Court must uphold the ALJ’s denial of benefits if
 7 the evidence is susceptible to more than one rational interpretation, one of which
 8 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d
 9 1190, 1193 (9th Cir. 2004). It “must consider the entire record as a whole,
 10 weighing both the evidence that supports and the evidence that detracts from the
 11 Commissioner’s conclusion, and may not affirm simply by isolating a specific
 12 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
 13 2017) (quotation omitted). “If the evidence can support either outcome, the court
 14 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

15 For claims filed on or after March 27, 2017,³ like the present claim, new
 16 regulations apply regarding the evaluation of medical evidence. Revisions to Rules
 17 Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017).
 18 The new regulations eliminate any semblance of a hierarchy of medical opinions
 19 and state that the agency does not defer to any medical opinions. 20 C.F.R.
 20 §§ 404.1520c(a), 416.920c. Specifically, the rules eliminate the agency’s “treating
 21 source rule,” which gave special deference to certain opinions from treating
 22 sources. 82 Fed. Reg. at 5853. In articulating the ALJ’s consideration of medical
 23 opinions for persuasiveness, the ALJ considers the following factors: (1)
 24 Supportability and (2) Consistency; (3) Relationship with the claimant, including
 25

26 ³ For claims filed prior to March 27, 2017, an ALJ was to give more weight to “those
 27 physicians with the most significant clinical relationship with the plaintiff.”
 28 *Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir. 2008).

1 (i) length of treatment relationship; (ii) frequency of examinations; (iii) purpose of
2 the treatment relationship; (iv) extend of the treatment relationship; (v)
3 examination relationship; (4) Specialization; and (5) Other factors, including
4 whether the medical source has familiarity with the other evidence or an
5 understanding of SSA's disability program's policies and evidentiary requirements.
6 20 C.F.R. §§ 404.1520c(b), 416.920c(b). The most important factors in evaluating
7 the persuasiveness of medical opinions are supportability and consistency. 20
8 C.F.R. §§ 404.1520c(a), 416.920c(a).

9 Supportability and consistency are further explained in the regulations:

10 (1) *Supportability*.

11 The more relevant the objective medical evidence and supporting
12 explanations presented by a medical source are to support his or her medical
13 opinion(s) or prior administrative medical finding(s), the more persuasive
the medical opinions or prior administrative medical finding(s) will be.

14 (2) *Consistency*.

15 The more consistent a medical opinion(s) or prior administrative medical
16 finding(s) is with the evidence from other medical sources and nonmedical
17 sources in the claim, the more persuasive the medical opinion(s) or prior
administrative medical finding(s) will be.

18 20 C.F.R. §§ 404.1520c(c); 416.920c(c).

19 When a medical source provides multiple medical opinions, the ALJ must
20 articulate how it considered these opinions in a single analysis applying the above-
21 listed factors. 20 C.F.R. §§ 404.1520c(b)(1), 416.920c(b)(1). If equally persuasive
22 medical opinions about the same issue are both equally well-supported and
23 consistent with the record, but are not exactly the same, the ALJ must articulate
24 how it considered the other most persuasive factors in making its decision. 20
C.F.R. §§ 404.1520c(c)(3), 416.920c(c)(3).

25 **IV. Statement of Facts**

26 The facts have been presented in the administrative record, the ALJ's
27 decision, and the briefs to this Court. Only the most relevant facts are summarized
28

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1 herein.

2 Plaintiff was 22 years old on the date the application was filed. When he was
 3 16, he was diagnosed with Crohn's disease and ulcerative colitis. He has been
 4 unable to achieve remission although he has achieved periods of stability. When he
 5 has flare-ups, he usually ends up at the emergency room due to the pain. Starting in
 6 2018, he began experiencing intermittent severe abdominal pain, usually in his
 7 lower left quadrant. He has tried different medications, some dictated by his
 8 insurance and others, which have initially proven effective but become less so
 9 when his body develops anti-bodies to the medicine. He uses hydrocodone to
 10 manage his pain. At the time of the hearing, he was currently on Xeljanz, and he
 11 reported that it was working, although he reported that when he tried a lower dose,
 12 his pain increased. He testified that his pain is sporadic. Some days he does not
 13 need any pain medicine and other days his stomach hurts so bad he is scrunched
 14 over in pain. He has a restrictive diet, eating only rice, meat and potatoes.

15 He worked for a short time at Lowes and Best Buy and worked
 16 approximately four months watching his nephews. He lives with his mother, and
 17 he can drive.

18 V. The ALJ's Findings

19 The ALJ issued an opinion affirming denial of benefits. AR 24-33. At step
 20 one, the ALJ found that Plaintiff has not engaged in substantial gainful activity
 21 since October 4, 2018, the application date. AR 26.

22 At step two, the ALJ identified the following severe impairments: obesity;
 23 Crohn's disease/ulcerative colitis; asthma. AR 26.

24 At step three, the ALJ found that Plaintiff did not have an impairment or
 25 combination of impairments that meets or medically equals the severity of one of
 26 the listed impairments. AR 18. Specifically, the ALJ found that Plaintiff did not
 27 meet the listing 5.06 (Inflammatory bowel disease) and 9.00 (Endocrine disorders).
 28 Ultimately, the ALJ concluded that Plaintiff has a residual function capacity

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1 (“RFC”) to perform:

2 to perform light work as defined in 20 CFR 416.967(b). The claimant
 3 can occasionally climb stairs and never climb ladders, ropes, or
 4 scaffolds. He can frequently perform other postural activities (balance,
 5 stoop, kneel, crouch, crawl). He must avoid concentrated exposure to
 6 respiratory irritants and avoid all exposure to hazards. He requires a
 workplace with ready access to a restroom.

6 AR 28.

7 At step four, the ALJ found that Plaintiff was unable to perform past
 8 relevant work. AR 31

9 At step five, the ALJ found that Plaintiff was not disabled and capable of
 10 performing work that exists in significant numbers in the national economy,
 11 including storage facility rental clerk, mail clerk, and collator operator. AR 32.

12 VI. Issues for Review

- 13 1. Whether the ALJ properly assessed Plaintiff’s credibility.
- 14 2. Whether the ALJ properly determined the RFC.

15 VII. Discussion

16 The ALJ found that Plaintiff’s statements concerning the intensity,
 17 persistence, and limiting effects of these symptoms were not entirely consistent
 18 with the medical evidence and other evidence in the record.

19 In determining whether a claimant’s testimony regarding subjective pain or
 20 symptoms is credible, the ALJ engages in a two-step analysis. *Garrison v. Colvin*
 21 759 F.3d 995, 1014 (9th Cir. 2014). “First, the ALJ must determine whether the
 22 claimant has presented objective medical evidence of an underlying impairment
 23 which could reasonably be expected to produce the pain or other symptoms
 24 alleged.” *Id.* (citation and quotation omitted). If the claimant satisfies the first step
 25 of the analysis, and there is no evidence of malingering, the ALJ can reject the
 26 claimant’s testimony about the severity of their symptoms “only by offering
 27 specific, clear and convincing reasons for doing so.” *Id.* (citation and quotation
 28

1 omitted). “This is not an easy requirement to meet: The clear and convincing
 2 standard is the most demanding required in Social Security cases.” *Id.* (citation and
 3 quotation omitted).

4 The ALJ found that Plaintiff’s level of activity is congruent with light work
 5 because he could drive and was able to walk a mile, although the ALJ noted that he
 6 has low energy throughout the day. The ALJ found that Plaintiff has a history of
 7 some noncompliance with treatment directives, such as stool studies, enema, and
 8 medication. The ALJ noted that Plaintiff declined physical therapy. The ALJ
 9 concluded this indicates that Plaintiff has not put forth full effort in retaining or
 10 recouping functional capacity and speculated that this evidence suggested that
 11 Plaintiff’s limitations are less than alleged because one would expect strict
 12 compliance with medical directives given the alleged severity of symptoms. The
 13 ALJ was especially troubled by Plaintiff’s failure to provide a function report.

14 The ALJ noted the record does not indicate limited range of motion, gait
 15 problems, motor, sensation, or strength deficits and noted that the record indicates
 16 that Plaintiff “often presents with no particular distress.” She stated the record
 17 shows that the different medications were effective.

18 The ALJ’s reasons for rejecting Plaintiff’s symptom statements are not
 19 supported by the record and therefore do not meet the clear and convincing
 20 standard. The ALJ makes no mention of the seemingly monthly visits to the
 21 Emergency Room because of chronic abdominal pain. Most recently, Plaintiff’s
 22 doctor in Seattle suggested that he may be suffering from vasculitis, which would
 23 better explain his chronic pain. While it is true Plaintiff declined physical therapy,
 24 it was in relation to an ankle injury that occurred in 2016. The ALJ cherry-picked
 25 the record to find a few instances where Plaintiff failed to provide a stool sample or
 26 was unable to use an enema. It is not clear from the record, however, whether it
 27 was because Plaintiff never tried, or whether the stool sample was deemed
 28 inadequate. Contrast that to over 1500 pages of medical records that show Plaintiff

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1 following treatment protocols, including using enemas on a nightly basis. The
 2 record as a whole shows that Plaintiff was consistently compliant with
 3 medications, diligently sought pain relief, sought care from various GI and pain
 4 management specialists, and took medications as prescribed.

5 Because the ALJ discounted Plaintiff's symptom testimony regarding his
 6 chronic abdominal pain, which is well-documented and well-supported in the
 7 record, it failed to properly determine his RFC by not accounting for the
 8 intermittent periods where Plaintiff would be off task or absent due to his inability
 9 to move or get out of bed because of the pain. Moreover, the ALJ failed to account
 10 for the fact that Plaintiff is a chronic opiate user and whether this would affect his
 11 ability to perform work. Also, the record does not support the ALJ's conclusion
 12 that his medications were effective. Rather, it is clear from the record that while
 13 some medications may have been effective initially, with time the benefits
 14 diminished, or the new medicine that were tried had no effect on his symptoms.

15 The ALJ erred in discounting Plaintiff's symptoms regarding his chronic
 16 abdominal pain, and as such, the RFC determination and ultimate disability
 17 determination are not supported by substantial evidence. As such, it is necessary to
 18 remand this matter for further administrative proceedings, including a *de novo*
 19 hearing and a new decision.

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

21 1. Plaintiff's Motion for Summary Judgment, ECF No. 17, is

22 **GRANTED.**

23 2. Defendant's Motion for Summary Judgment, ECF No. 18, is

24 **DENIED.**

25 3. The decision of the Commissioner is **reversed** and **remanded** for
 26 proceedings consistent with this Order.

27 4. Judgment shall be entered in favor of Plaintiff and against Defendant.

28 //

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1 5. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the
2 District Court Executive is directed to substitute Kilolo Kijakazi for Andrew Saul.

3 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
4 file this Order, provide copies to counsel, and **close** the file.

5 **DATED** this 28th day of January 2022.



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8 Stanley A. Bastian

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10 Stanley A. Bastian
11 Chief United States District Judge

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