

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

Mar 25, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASON RAYMOND S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-CV-05078-RHW

**ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties’ cross-motions for summary judgment. ECF Nos. 12 & 13. Plaintiff brings this action seeking judicial review pursuant to 42 U.S.C. § 405(g) of the Commissioner’s final decision, which denied his application for Disability Insurance Benefits under Title II of the Social Security Act. 42 U.S.C §§ 401-434. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set forth below, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 **I. Jurisdiction**

2 Plaintiff filed his application for Disability Insurance Benefits on April 7,
3 2014. AR 183-189. His alleged onset date of disability is March 22, 2013. AR 183.
4 Plaintiff’s applications were initially denied on August 28, 2014, AR 103-117,
5 133-35, and on reconsideration on November 21, 2014, AR 118-132, 137-38.

6 A hearing with Administrative Law Judge (“ALJ”) Glenn G. Meyers
7 occurred on September 28, 2016. AR 55-102. On December 1, 2016, the ALJ
8 issued a decision finding Plaintiff ineligible for disability benefits. AR 35-54. On
9 March 16, 2018, the Appeals Council denied Plaintiff’s request for review, thus
10 making the ALJ’s ruling the final decision of the Commissioner. AR 1-4.

11 On May 17, 2018, Plaintiff timely filed the present action challenging the
12 denial of benefits. ECF No. 3. Accordingly, Plaintiff’s claims are properly before
13 this Court pursuant to 42 U.S.C. § 405(g).

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

15 The Social Security Act defines disability as the “inability to engage in any
16 substantial gainful activity by reason of any medically determinable physical or
17 mental impairment which can be expected to result in death or which has lasted or
18 can be expected to last for a continuous period of not less than twelve months.” 42
19 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
20 under a disability only if the claimant’s impairments are so severe that the claimant

1 is not only unable to do his previous work, but cannot, considering claimant’s age,
2 education, and work experience, engage in any other substantial gainful work that
3 exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

4 The Commissioner has established a five-step sequential evaluation process
5 for determining whether a claimant is disabled within the meaning of the Social
6 Security Act. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Lounsbury v. Barnhart*,
7 468 F.3d 1111, 1114 (9th Cir. 2006).

8 Step one inquires whether the claimant is presently engaged in “substantial
9 gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b). Substantial gainful
10 activity is defined as significant physical or mental activities done or usually done
11 for profit. 20 C.F.R. §§ 404.1572, 416.972. If the claimant is engaged in substantial
12 activity, he or she is not entitled to disability benefits. 20 C.F.R. §§ 404.1571,
13 416.920(b). If not, the ALJ proceeds to step two.

14 Step two asks whether the claimant has a severe impairment, or combination
15 of impairments, that significantly limits the claimant’s physical or mental ability to
16 do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). A severe
17 impairment is one that has lasted or is expected to last for at least twelve months,
18 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09,
19 416.908-09. If the claimant does not have a severe impairment, or combination of
20

1 impairments, the disability claim is denied and no further evaluative steps are
2 required. Otherwise, the evaluation proceeds to the third step.

3 Step three involves a determination of whether one of the claimant’s severe
4 impairments “meets or equals” one of the listed impairments acknowledged by the
5 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
6 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
7 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
8 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
9 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the
10 fourth step.

11 Step four examines whether the claimant’s residual functional capacity
12 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f),
13 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is
14 not entitled to disability benefits and the inquiry ends. *Id.*

15 Step five shifts the burden to the Commissioner to prove that the claimant is
16 able to perform other work in the national economy, taking into account the
17 claimant’s age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
18 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
19 burden, the Commissioner must establish that (1) the claimant is capable of
20 performing other work; and (2) such work exists in “significant numbers in the

1 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
2 676 F.3d 1203, 1206 (9th Cir. 2012).

3 **III. Standard of Review**

4 A district court’s review of a final decision of the Commissioner is governed
5 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
6 Commissioner’s decision will be disturbed “only if it is not supported by
7 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1144,
8 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than a
9 mere scintilla but less than a preponderance; it is such relevant evidence as a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159. In
11 determining whether the Commissioner’s findings are supported by substantial
12 evidence, “a reviewing court must consider the entire record as a whole and may
13 not affirm simply by isolating a specific quantum of supporting evidence.” *Id.*

14 In reviewing a denial of benefits, a district court may not substitute its
15 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
16 1992). When the ALJ presents a reasonable interpretation that is supported by the
17 evidence, it is not the role of the courts to second-guess it. *Rollins v. Massanari*,
18 261 F.3d 853, 857 (9th Cir. 2001). Even if the evidence in the record is susceptible
19 to more than one rational interpretation, if inferences reasonably drawn from the
20 record support the ALJ’s decision, then the court must uphold that decision.

1 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Thomas v.*
2 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

3 **IV. Statement of Facts**

4 The facts of the case are set forth in detail in the transcript of proceedings
5 and only briefly summarized here. Plaintiff was 33 years old on the alleged date of
6 onset. AR 59. He has a high school education and is able to communicate in
7 English. AR 200, 202. Plaintiff has past work as a truck body builder, a short order
8 clerk, a concrete pipe maker, a bartender helper, a bartender, and a fast food
9 service manager. AR 48, 210, 236-247.

10 **V. The ALJ's Findings**

11 The ALJ determined that Plaintiff was not under a disability within the
12 meaning of the Act at any time from March 22, 2013 (the alleged onset date)
13 through June 30, 2015 (the date last insured). AR 50.

14 **At step one**, the ALJ found that Plaintiff had not engaged in substantial
15 gainful activity from his alleged onset date, March 22, 2013, through his date last
16 insured, June 30, 2015 (citing 20 C.F.R. § 404.1571 *et seq.*). AR 40.

17 **At step two**, the ALJ found Plaintiff had the following severe impairments:
18 degenerative disc disease, sacroiliac joint dysfunction, myofascial pain syndrome,
19 affective disorder (depressive and/or bipolar disorder), and anxiety disorder (citing
20 20 C.F.R. § 404.1520(c)). AR 40.

1 At **step three**, the ALJ found that through the date last insured, Plaintiff did
2 not have an impairment or combination of impairments that met or medically
3 equaled the severity of one of the listed impairments in 20 C.F.R. § 404, Subpt. P,
4 App. 1. AR 41.

5 **At step four**, the ALJ found that through the date last insured, Plaintiff had
6 the residual functional capacity to perform light work as defined in 20 C.F.R. §
7 404.1567(b), except: he needed to shift position while seated at work; he needed to
8 change from sitting to standing for brief periods without leaving the workstation;
9 he could not climb ladders, ropes, or scaffolding; he could occasionally stoop,
10 squat, crouch, crawl, kneel, and climb ropes and stairs; he could have no public
11 contact; he was capable of working in proximity with co-workers, but not in
12 coordination with them; he could have occasional contact with supervisors; he
13 would be absent from work up to six times per year, and off-task up to ten percent
14 of his work shifts while still meeting minimum production requirements. AR 42.
15 The ALJ further found that Plaintiff was capable of engaging in unskilled,
16 repetitive, routine tasks in two-hour increments. AR 42.

17 The ALJ further found that through the date last insured, Plaintiff was
18 unable to perform any past relevant work, given his physical and psychological
19 limitations. AR 48.

1 Cir. 2001); *see* 20 C.F.R. § 404.1527(c)(1)-(2). Generally, a treating physician’s
2 opinion carries more weight than an examining physician’s, and an examining
3 physician’s opinion carries more weight than a nonexamining physician’s.
4 *Holohan*, 246 F.3d at 1202. In addition, the regulations give more weight to
5 opinions that are explained than to those that are not, and to the opinions of
6 specialists concerning matters relating to their specialty over those of non-
7 specialists. *Id.*

8 If a treating or examining physician’s opinion is uncontradicted, an ALJ
9 may reject it only by offering “clear and convincing reasons that are supported by
10 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005)
11 (citation omitted). If a treating or examining doctor’s opinion is contradicted by
12 another doctor’s opinion, an ALJ may only reject it by providing “specific and
13 legitimate reasons that are supported by substantial evidence.” *Id.*

14 The ALJ satisfies the specific and legitimate standard by “setting out a
15 detailed and thorough summary of the facts and conflicting clinical evidence,
16 stating his [or her] interpretation thereof, and making findings.” *Garrison v.*
17 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (internal quotation marks omitted). In
18 contrast, an ALJ fails to satisfy the standard when he or she “rejects a medical
19 opinion or assigns it little weight while doing nothing more than ignoring it,
20 asserting without explanation that another medical opinion is more persuasive, or

1 criticizing it with boilerplate language that fails to offer a substantive basis for his
2 [or her] conclusion.” *Id.* at 1012-13.

3 **2. How the ALJ determined Plaintiff’s residual functional capacity**

4 In reaching his decision, the ALJ relied heavily on two agency
5 nonexamining psychological consultants—Dr. Janis Lewis and Dr. Andrew
6 Forsyth—who opined that Plaintiff could work in a low-stress environment doing
7 simple, routine tasks. AR 48, 104-117 (Dr. Lewis), 120-125 (Dr. Forsyth). The
8 ALJ also relied heavily on nonexamining medical consultant Dr. Guillermo Rubio,
9 who opined that Plaintiff was able to do light work. AR 48, 118-132.

10 However, the ALJ also incorporated limitations from examining
11 psychologist Dr. Nora K. Marks’ evaluation, as well as PT Mark Johnson’s
12 functional capacity evaluation (FCE). Plaintiff argues that by doing this, the ALJ
13 contradicted himself because parts of Dr. Marks’ and Mr. Johnson’s opinions were
14 inconsistent with parts of the nonexamining consultants’ opinions. ECF No. 12 at
15 14-15. But the reason the ALJ did this was to make Plaintiff’s residual functional
16 capacity a more holistic reflection of his overall abilities. This was not error.

17 **3. Dr. Linda L. Walby**

18 Dr. Walby was a treating physician who Plaintiff began seeing in April
19 2014. AR 333. In August 2014, she opined that Plaintiff could not return to his
20 previous heavy labor job manufacturing and welding truck beds, which required

1 him to lift and carry steel beams weighing 50 to 150 pounds. AR 330; *see* AR 242,
2 283. She endorsed Mr. Johnson’s FCE, and further opined that as of August 2014,
3 Plaintiff was limited to “less than 40 hour sedentary work tolerance.” AR 331.
4 However, she qualified this by stating, “I am certainly not saying it is permanent.”¹
5 AR 331. She said she was “not willing to go further than 6 months from now” and
6 recommended additional imaging after six months, which apparently never
7 occurred. AR 331. Because Dr. Walby was a treating doctor whose opinion was
8 contradicted by other doctors, the ALJ was required to provide specific and
9 legitimate reasons for discounting it.² *Bayliss*, 427 F.3d at 1216.

10 The ALJ gave some weight to Dr. Walby’s opinion. AR 46. The ALJ agreed
11 that Plaintiff could not return to medium or heavy work. AR 46. However, the ALJ
12 disagreed that Plaintiff was limited to less than 40 hours of sedentary work. *See*
13 AR 46. The ALJ reasoned that Plaintiff’s work history, treatment records, medical
14 imaging, examination findings, and daily activities all indicated that Plaintiff was
15 not this limited. AR 46.

16 ¹ Plaintiff asserts, without citation to the record, that Dr. Walby actually opined that his
17 condition “would only worsen over time.” ECF No. 12 at 14. Dr. Walby’s records do not appear
to contain such an opinion. *See* AR 328-345.

18 ² Relying on *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155 (9th Cir. 2008), the
19 Commissioner argues that, because Dr. Walby put temporal limitations on her opinion, her
20 opinion on disability was not probative and therefore should be rejected as a matter of law. But
this was not the grounds the ALJ relied on for rejecting Dr. Walby’s opinion. *See* AR 46.
Moreover, in *Carmickle*, the doctor excused the claimant from work for two weeks, released him
to full duty after two months, and the court of appeals simply upheld the ALJ’s finding that this
deserved little weight in evaluating the claimant’s long-term functioning. *Id.* at 1165. The
Carmickle court did not hold that temporary work limitations can never be probative evidence as
a matter of law.

1 These were specific and legitimate reasons for discounting this portion of
2 Dr. Walby's opinion.³ *Id.* Although the ALJ agreed Plaintiff could not return to
3 the heavy labor job that he had in the early 2000s, Plaintiff worked at Jack
4 Didley's Bar & Grill in 2012, where he cleaned, bartended, and stocked kegs and
5 bottles that weighed between 30 to 50 pounds. AR 282. He quit this job because he
6 "got pissed off" about having to work on holidays. AR 348. From July 2012 to
7 April 2014, Plaintiff worked at his wife's metal fabrication business doing "small
8 knick-knack repair," AR 72-73, which was well after his alleged disability onset
9 date and was also around the time he began going to Dr. Walby. He told Dr. Marks
10 that after a couple of years in business, "he could not keep it open." AR 348. He
11 also told Dr. Marks that he had been filling out job applications but that his living
12 location made him a "less than desirable employee," as employers believed "he
13 may not be able to make it to work." AR 348. This all indicates that he could
14 perform more than just sedentary work.

15 Plaintiff repeatedly argues that his recent work history is irrelevant, given
16 the ALJ's finding that he is unable to perform any past relevant work. *See* ECF No.
17 12 at 12, 18. However, the ALJ found that Plaintiff was only prevented from
18 performing medium and heavy work due to his *physical* impairments. AR 46. The

19 ³ Plaintiff argues that the ALJ "did not provide a single example of Dr. Walby's opinion
20 that was inconsistent with the record." ECF No. 12 at 14. However, the ALJ had just discussed in
immense detail all the ways in which the medical evidence demonstrated that Plaintiff could
perform light work. *See* AR 43-46. This prior discussion was clearly incorporated into the ALJ's
discussion of Dr. Walby.

1 reason he could not perform past light work—such as bartending or managing a
2 restaurant—was because of his psychological issues, which were not part of Dr.
3 Walby’s opined limitations. *See* AR 48, 331.

4 The ALJ also found that Plaintiff’s treatment records indicated that he was
5 not limited to less than 40 hours of sedentary work. AR 46. When Plaintiff first
6 began physical therapy in May 2013, he denied taking any medication for back
7 pain other than an occasional ibuprofen. AR 299. Around this time, he would “be
8 laid up for a day or [two]” following physical activity. AR 299. Several weeks later
9 however, his pain tolerance was increased and he was able to complete all
10 exercises. AR 305-06. Over the next few months, he showed better control with his
11 exercises and felt like he had gotten much stronger. AR 311. When he finished
12 physical therapy after 11 visits, he showed good gains in strength and reported
13 improved function and decreased pain. AR 314.

14 The ALJ also found that Plaintiff’s medical imaging and examination
15 findings indicated that he was not limited to less than 40 hours of sedentary work.
16 AR 46. A June 2013 computerized tomography (CT) scan of Plaintiff’s lumbar
17 spine was normal except for a slight disc protrusion at L5-S1, with no evidence of
18 spinal stenosis or nerve root impingement. AR 339. He consistently had negative
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20

1 straight leg raise tests.⁴ AR 300, 336, 489. During his FCE with Mr. Johnson, he
2 had normal trunk flexion, normal trunk rotation, and normal trunk muscle strength,
3 although he did have limitations with repetitively lifting medium to heavy weight,
4 prolonged static positioning, and walking long distances. AR 369, 374. An ALJ
5 may reject a doctor's opinion when it is inconsistent with other evidence in the
6 record. *See Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.
7 1999).

8 Finally, the ALJ found that Plaintiff's daily activities indicated that he was
9 not limited to less than 40 hours of sedentary work. AR 46. Plaintiff worked at his
10 wife's metal fabrication business for over a year after his alleged onset date, and
11 only quit working when they could no longer keep the business open. *See* AR 72,
12 348. After the business closed, Plaintiff was a stay-at-home parent for three
13 children, ages six, eight, and ten. AR 62, 348. He reported that he managed the
14 laundry, housekeeping, shopping, and cooking. AR 348. These daily activities
15 demonstrate activity level beyond what Dr. Walby's opined limitations suggest. An
16 ALJ may properly reject a treating doctor's opinion that provides restrictions that
17 appear inconsistent with the claimant's level of activity. *Rollins*, 261 F.3d at 856.

18 Because the ALJ offered specific and legitimate reasons for partially
19 discounting Dr. Walby's opinion, the Court finds the ALJ did not err.

20 ⁴ The straight leg raise is a test done during a physical examination to determine whether
a patient with low back pain has an underlying herniated disc, often located at L5.

1 **4. Dr. Nora K. Marks**

2 Dr. Marks is an examining psychologist who evaluated Plaintiff in August
3 2014. AR 346. Dr. Marks diagnosed Plaintiff with a very low level of depression
4 and Post-Traumatic Stress Disorder. AR 348, 350. She opined that Plaintiff
5 presented as a poor prospect for work due to his unstable and highly reactive
6 nature. AR 350. However, she also opined that Plaintiff had learned to control
7 some of his violent impulses, that his prognosis was fair, and that he functions well
8 in a low-stress environment. AR 350. She recommended that Plaintiff contact the
9 Department of Vocational Rehabilitation to assist him in job skills. AR 350.

10 The ALJ gave some weight to Dr. Marks' assessment. AR 47. Relying in
11 part on her opinion, the ALJ concluded that Plaintiff was limited to unskilled,
12 repetitive, routine tasks in an environment with no public interaction, occasional
13 interaction with supervisors, and no collaboration with coworkers. AR 42, 47.
14 Therefore, contrary to Plaintiff's assertions, the ALJ did not reject Dr. Marks'
15 report. Rather, the ALJ incorporated her opinions into Plaintiff's residual
16 functional capacity. *See Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th
17 Cir. 2010).

1 **5. Nonmedical “Other Source” Opinions**

2 **a. Lower legal standard**

3 Importantly, the “specific and legitimate” standard analyzed above only
4 applies to evidence from “acceptable medical sources.” *Molina*, 674 F.3d at 1111.
5 These include licensed physicians (*e.g.*, Dr. Walby), licensed psychologists (*e.g.*,
6 Dr. Marks), and various other specialists. *See* former 20 C.F.R. §§ 404.1513(a)
7 (2014).

8 “Other sources” for opinions—such as nurse practitioners, physician’s
9 assistants, therapists, teachers, social workers, chiropractors, and other nonmedical
10 sources—are not entitled to the same deference as acceptable medical sources.⁵
11 *Molina*, 674 F.3d at 1111; *Dale v. Colvin*, 823 F.3d 941, 943 (9th Cir. 2016); *see*
12 20 C.F.R. § 404.1527(f). ALJs must consider nonmedical sources’ lay observations
13 about a claimant’s symptoms or how an impairment affects ability to work. *Nguyen*
14 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). An ALJ may discount a
15 nonmedical source’s opinion by providing reasons “germane” to each witness for
16 doing so. *Popa v. Berryhill*, 872 F.3d 901, 906 (9th Cir. 2017); *Dodrill v. Shalala*,
17 12 F.3d 915, 919 (9th Cir. 1993).

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20 ⁵ For claims filed on or after March 27, 2017, licensed nurse practitioners and physician
assistants can qualify as acceptable medical sources in certain situations. *See* 20 C.F.R. §
404.1502(a)(7)-(8). Plaintiff filed his claim in 2014, so this does not apply here.

1 **b. Mark Johnson, P.T.**

2 Mark Johnson is a physical therapist who performed an FCE of Plaintiff in
3 July 2014. AR 367. Mr. Johnson opined that Plaintiff had limitations repetitively
4 lifting and carrying medium to heavy weight, walking long distances, and with
5 prolonged static positioning (*i.e.*, standing or sitting longer than 10 to 15 minutes).
6 AR 369-70.

7 The ALJ agreed with Mr. Johnson that Plaintiff needed to be able to shift
8 positions at work and alternate between sitting and standing. AR 46. The ALJ
9 incorporated this limitation into Plaintiff’s residual functional capacity. *See* AR 42.
10 The ALJ otherwise gave Mr. Johnson’s assessment little weight and listed multiple
11 germane reasons for doing so. AR 46.

12 First, the ALJ reasoned that Mr. Johnson’s opined limitations were
13 inconsistent with his contemporaneous findings showing a generally normal
14 physical examination, with only some reduced range of motion and minimal
15 weakness. AR 46, 374. A discrepancy between a doctor’s recorded observations
16 and opinions is a clear and convincing reason (and therefore, necessarily also a
17 “germane” reason) for not relying on that opinion. *Bayliss*, 427 F.3d at 1216.

18 The ALJ also listed the same reasons that are discussed in detail above—
19 Plaintiff’s recent work history, his physical therapy records documenting improved
20 function and decreased pain after his alleged onset date, his other examination

1 findings, his relatively normal CT scan, and his daily childcare activities. AR 46;
2 *see supra* pgs. 12-14. Because these reasons meet the higher “specific and
3 legitimate” standard for accepted medical sources, it follows that they also meet
4 the lower “germane reasons” standard for nonmedical sources. *See Valentine v.*
5 *Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009). The Court concludes
6 the ALJ did not err by assigning little weight to Mr. Johnson’s opined limitations.

7 **c. Ryan Law, PA-C**

8 Ryan Law is a physician’s assistant who Plaintiff began seeing for primary
9 care beginning in 2013. AR 358. In April 2016, Mr. Law wrote a letter to the ALJ
10 stating that the FCE should have qualified Plaintiff for disability benefits. AR 487.
11 Mr. Law also stated that Plaintiff’s functional capacity had not improved and was
12 not expected to. AR 487.

13 The ALJ gave minimal weight to Mr. Law’s letter, given that it did not
14 include any independent opinions about Plaintiff’s functioning, but rather simply
15 agreed with the FCE. AR 46. An ALJ need not accept the opinion of even a doctor
16 if it is brief, conclusory, and inadequately supported by clinical findings. *Bayliss*,
17 427 F.3d at 1216. Thus, the ALJ did not err in discounting Mr. Law’s opinion.

18 After the ALJ’s opinion was issued, Mr. Law submitted a three-page letter to
19 the Appeals Council explaining his opinion in more detail. AR 29-31. The Appeals
20 Council stated that the evidence did not relate to the period on or before the ALJ’s

1 decision and declined to consider it. AR 2. Plaintiff now argues that this
2 supplemental letter establishes Mr. Law's independent opinion with respect to
3 Plaintiff's functioning. *See* ECF No. 12 at 11, 14.

4 When the Appeals Council refuses to consider additional evidence, it is not
5 made part of the evidence contained in the administrative record that is subject to
6 this Court's substantial evidence review. *Brewes v. Comm'r of Soc. Sec. Admin.*,
7 682 F.3d 1157, 1163 (9th Cir. 2012). However, even if it were, Mr. Law's
8 supplemental letter states that the Mr. Johnson's FCE "is still a fair representation
9 of the patient's ability to function." AR 2. Because the ALJ already assigned
10 minimal weight to Mr. Johnson's evaluation for the reasons outlined above, Mr.
11 Law's supplemental letter has no effect on the outcome of this case.

12 **d. Melissa Souza, LMHC**

13 Melissa Souza is a licensed mental health counselor who Plaintiff began
14 seeing in June 2015. AR 496. In August 2016, she wrote a two-page letter to the
15 ALJ opining on Plaintiff's various impairments. AR 496-97. She opined that
16 Plaintiff's mental conditions made him irritable and angry, highly distractible, and
17 unable to concentrate. AR 496. She stated that as a result, Plaintiff does not pay
18 close attention to detail and makes careless mistakes at work. AR 496. She opined
19 that any stress causes his mental state to deteriorate quickly, and that this causes
20 him to become so irritable that he throws things, yells, screams, and then leaves the

1 job site. AR 496-97. She believed Plaintiff’s mental health condition is permanent.
2 AR 497.

3 Ms. Souza also opined about Plaintiff’s physical limitations. AR 496. She
4 stated his back pain prevents him from working a steady job. AR 496. She
5 described his limitations with lifting, sitting, and walking. AR 496. She believed
6 his “physical condition is degenerative and will not improve with time.” AR 498.

7 The ALJ gave minimal weight to Ms. Souza’s statement and provided
8 multiple germane reasons for doing so. AR 47. First, the ALJ reasoned that Ms.
9 Souza’s opinions did not appear to be based on any objective evidence but rather
10 Plaintiff’s self-reports of both his symptoms and past occupational difficulties. AR
11 47. An ALJ may discount even a treating physician’s opinion if it is based largely
12 on the claimant’s self-reports and not on clinical evidence, and the ALJ finds the
13 claimant not credible. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

14 Plaintiff argues this was error, given that mental health treatment inherently
15 involves self-reports. ECF No. 12 at 16. But as the Ninth Circuit has explained,
16 there are objective, clinical tests in psychiatric evaluations—such as assessments
17 and mental status evaluations—and an ALJ may give less weight to a mental health
18 opinion when it relies “more heavily” on self-reports than on clinical observations,
19 particularly when the ALJ finds the claimant’s testimony is not credible. *Buck v.*
20 *Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).

1 Moreover, the ALJ reasoned that Ms. Souza’s opinions were inconsistent
2 with Plaintiff’s other psychological treatment records. During mental health
3 treatment in May 2014, he exhibited appropriate affect, normal mood, good
4 grooming, normal impulse control, and intact thought process, memory, and
5 judgment. AR 324. Later, during his psychological evaluation with Dr. Marks, he
6 denied having serious mental health problems. AR 347. He exhibited generally
7 calm and euthymic mood, had well-organized mental activity, and had no
8 difficulties with thought, cognition, or concentration. AR 349. Dr. Marks opined
9 that Plaintiff had a “very low level” of depression and “moderate” PTSD
10 symptoms. AR 348. During his regular medical appointments from 2013 to 2015,
11 he consistently displayed normal mood, affect, judgment, and behavior. AR 318,
12 320, 335, 353, 355, 358, 363, 365. In light of this inconsistent evidence, the ALJ
13 properly rejected Ms. Souza’s opinion. *See Morgan*, 169 F.3d at 600.

14 Finally, the ALJ rejected Ms. Souza’s opinions with respect to Plaintiff’s
15 physical conditions, given that her specialty is mental health. AR 47. This was
16 proper. *See* 20 C.F.R. § 404.1527(c)(5); *Holohan*, 246 F.3d at 1202. For these
17 germane reasons, the ALJ did not err by assigning minimal weight to Ms. Souza’s
18 opined limitations.⁶

19 ⁶ The ALJ also discounted Ms. Souza’s opinion due to Plaintiff’s recent work history. AR
20 47. Given that the ALJ also found that Plaintiff could not perform some of his prior light work
due to his psychological limitations, this likely was an improper reason. However, the ALJ’s
other germane reasons each independently support his decision to discount Ms. Souza’s opinion.

1 **B. The ALJ did not Improperly Reject Plaintiff’s Subjective Complaints.**

2 Plaintiff argues the ALJ erred by discounting the credibility of his testimony
3 regarding his subjective symptoms. ECF No. 12 at 17-19. An ALJ engages in a
4 two-step analysis to determine whether a claimant’s testimony regarding subjective
5 symptoms is credible. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).
6 First, the claimant must produce objective medical evidence of an underlying
7 impairment or impairments that could reasonably be expected to produce some
8 degree of the symptoms alleged. *Id.* Second, if the claimant meets this threshold,
9 and there is no affirmative evidence suggesting malingering, the ALJ can reject the
10 claimant’s testimony about the severity of his symptoms only by offering “specific,
11 clear, and convincing reasons” for doing so. *Id.*

12 In weighing a claimant’s credibility, the ALJ may consider many factors,
13 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s
14 reputation for lying, prior inconsistent statements concerning the symptoms, and
15 other testimony by the claimant that appears less than candid; (2) unexplained or
16 inadequately explained failure to seek treatment or to follow a prescribed course of
17 treatment; and (3) the claimant’s daily activities.” *Smolen v. Chater*, 80 F.3d 1273,
18 1284 (9th Cir. 1996).

19 Here, the ALJ found that the medically determinable impairments could
20 reasonably be expected to produce the symptoms Plaintiff alleged. AR 43.

1 However, the ALJ determined that Plaintiff's statements of intensity, persistence,
2 and limiting effects of his symptoms were not entirely consistent with the medical
3 evidence and other evidence in the record. AR 43. The ALJ provided multiple clear
4 and convincing reasons for discrediting Plaintiff's subjective complaint testimony.
5 AR 43-46.

6 First, the ALJ reasoned that Plaintiff's lack of ongoing employment was due
7 to factors unrelated to his allegedly disabling impairments, AR 43, as is discussed
8 in detail above. *See supra* pgs. 12-13. This is a sufficient basis to discredit
9 subjective pain testimony. *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001).

10 Second, the ALJ reasoned that Plaintiff's spine conditions improved after he
11 began physical therapy shortly after his alleged onset date. AR 44; *see supra*, pgs.
12 13-14. An ALJ may find a claimant's subjective symptom testimony not credible
13 based on evidence of effective responses to treatment. *See, e.g., Burch v. Barnhart*,
14 400 F.3d 676, 681 (9th Cir. 2005); 20 C.F.R. §§ 404.1529(c)(3)(v), 416.929(c)(3).

15 Third, the ALJ reasoned that Plaintiff's allegations of completely
16 debilitating physical and mental limitations were inconsistent with the medical
17 evidence and his treatment records. AR 44-45. Plaintiff testified, for instance, that
18 he had to use a little red wagon to move things around his home and experienced
19 incapacitating depressive episodes that could "last up to three weeks easily." AR
20 66, 91.

1 The ALJ noted that Plaintiff’s testimony with respect to both his physical
2 and psychological limitations was inconsistent with the medical evidence, AR 44-
3 45; *see supra* pgs. 14, 21. An ALJ may discount a claimant’s subjective symptom
4 testimony when it is inconsistent with the medical evidence. *Carmickle v. Comm’r*
5 *of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Tonapetyan v. Halter*,
6 242 F.3d 1144, 1148 (9th Cir. 2001).

7 Finally, the ALJ found that Plaintiff’s allegations of completely disabling
8 limitations were belied by his daily ongoing childcare activities. AR 45; *see supra*
9 pg. 14. Activities inconsistent with the alleged symptoms—even when they
10 suggest some difficulty functioning—are proper grounds for questioning the
11 credibility of subjective allegations when the person claims a totally disabling
12 impairment. *Molina*, 674 F.3d at 1113; *see also Rollins*, 261 F.3d at 857; 20 C.F.R.
13 §§ 404.1529(c)(3)(i).

14 Moreover, the ALJ noted that Plaintiff’s assertion that his young children
15 could function independently and cook at a stove was inconsistent with the normal
16 behavior of young children and their need for supervision. AR 45-46. The ALJ
17 found this detracted from Plaintiff’s reliability, which the ALJ was entitled to
18 conclude. *See Smolen*, 80 F.3d at 1284.

19 When the ALJ presents a reasonable interpretation that is supported by
20 substantial evidence, it is not the Court’s role to second-guess it. The ALJ did not

1 err when discounting Plaintiff's subjective complaint testimony because the ALJ
2 provided multiple clear and convincing reasons for doing so.

3 **C. The ALJ did not Err in Framing Hypothetical Questions for the**
4 **Vocational Expert**

5 Plaintiff argues that the ALJ erred in framing his hypothetical questions for
6 the vocational expert because the questions did not include all of Plaintiff's
7 physical limitations as set forth by his medical providers. ECF No. 12 at 19-20.

8 However, the hypothetical the ALJ posed to the vocational expert was
9 consistent with the ALJ's findings relating to Plaintiff's residual functional
10 capacity.⁷ Compare AR 42 with AR 97-98. The ALJ included all of Plaintiff's
11 limitations, and the only omitted limitations were those that the ALJ found did not
12 exist.

13 Plaintiff's argument here essentially just restates his prior arguments that the
14 residual functional capacity did not account for all his limitations. Courts routinely
15 reject this argument. See *Stubbs-Danielson*, 539 F.3d 1169, 1175-76 (9th Cir.
16 2008); *Rollins*, 261 F.3d at 857. Because the ALJ included all of the limitations
17 that he found to exist, and because his findings are supported by substantial
18 evidence, the ALJ did not err in omitting the other limitations that Plaintiff claims,
19 but failed to prove. See *Rollins*, 261 F.3d at 857. Accordingly, the ALJ properly

20 ⁷ When determining Plaintiff's residual functional capacity, the ALJ specifically stated
that he "considered all symptoms and the extent to which these symptoms can reasonably be
accepted as consistent with the objective medical evidence." AR 43.

1 identified jobs in the national economy that existed in significant numbers and
2 matched Plaintiff's abilities, and therefore the ALJ satisfied step five of the
3 sequential evaluation process.

4 **VIII. Order**

5 Having reviewed the record and the ALJ's findings, the Court finds the
6 ALJ's decision is supported by substantial evidence and is free from legal error.

7 Accordingly, **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

9 2. Defendant's Motion for Summary Judgment, **ECF No. 13**, is

10 **GRANTED.**

11 3. Judgment shall be entered in favor of Defendant and the file shall be

12 **CLOSED.**

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter this Order,
14 forward copies to counsel, and **close the file.**

15 **DATED** this 25th day of March, 2019.

16 *s/Robert H. Whaley*
17 **ROBERT H. WHALEY**
Senior United States District Judge