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

Apr 30, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 4:18-CV-05081-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney D. James Tree represents Christopher S. (Plaintiff); Special Assistant United States Attorney Ryan Ta Lu represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

1 **JURISDICTION**

2 Plaintiff filed an application for Disability Insurance Benefits (DIB) on April  
3 2, 2014, Tr. 123, alleging disability since June 1, 2012, Tr. 232, due to back  
4 injuries and nerve problems, Tr. 260.<sup>1</sup> The application was denied initially and  
5 upon reconsideration. Tr. 1358-40, 144-48. Administrative Law Judge (ALJ)  
6 Larry Kennedy held a hearing on June 9, 2016 and heard testimony from Plaintiff  
7 and vocational expert Fred Cutler. Tr. 69-105. The ALJ issued an unfavorable  
8 decision on March 13, 2017. Tr. 28-38. The Appeals Council denied review on  
9 March 20, 2018. Tr. 1-5. The ALJ's March 13, 2017 decision became the final  
10 decision of the Commissioner, which is appealable to the district court pursuant to  
11 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on May 18, 2018.  
12 ECF Nos. 1, 4.

13 **STATEMENT OF FACTS**

14 The facts of the case are set forth in the administrative hearing transcript, the  
15 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
16 here.

17 Plaintiff was 32 years old at the alleged date of onset. Tr. 232. Plaintiff  
18 obtained his GED in 1998. Tr. 261. His reported work history includes positions  
19 as a CPU clerk for a furniture store, detailer for a car dealership, and laborer in a  
20 factory. Tr. 250, 261. Plaintiff was hired by Sykes Enterprises Inc. in June of

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21  
22 <sup>1</sup>Plaintiff filed a prior application for benefits on September 12, 2012, Tr.  
23 106, alleging an onset date of August 2, 2012, Tr. 107. The application was denied  
24 on November 9, 2012. Tr. 135-37. It does not appear that any appeal was filed.  
25 The Court finds that by making a determination of disability that overlaps the  
26 period of time at issue in the prior August 2012 application, the ALJ de facto  
27 reopened the prior adjudication. See *Lewis v. Apfel*, 236 F.3d 503, 510 (9th Cir.  
28 2001).

1 2015, Tr. 243, and was employed by Swift Transportation as a commercial truck  
2 driver from August 27, 2015 through September 8, 2015, Tr. 244.

3 When applying for benefits Plaintiff reported that he stopped working on  
4 August 18, 2008 because of other reasons, but he believed that his conditions  
5 became severe enough to keep him from working on October 13, 2010. Tr. 260.

### 6 **STANDARD OF REVIEW**

7 The ALJ is responsible for determining credibility, resolving conflicts in  
8 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
9 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
10 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
11 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
12 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
13 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
14 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
15 another way, substantial evidence is such relevant evidence as a reasonable mind  
16 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
17 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
18 interpretation, the court may not substitute its judgment for that of the ALJ.  
19 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
20 findings, or if conflicting evidence supports a finding of either disability or non-  
21 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
22 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
23 evidence will be set aside if the proper legal standards were not applied in  
24 weighing the evidence and making the decision. *Brawner v. Secretary of Health*  
25 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 26 **SEQUENTIAL EVALUATION PROCESS**

27 The Commissioner has established a five-step sequential evaluation process  
28 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); see *Bowen*

1 v. Yuckert, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of  
2 proof rests upon the claimant to establish a prima facie case of entitlement to  
3 disability benefits. Tackett, 180 F.3d at 1098-99. This burden is met once the  
4 claimant establishes that physical or mental impairments prevent him from  
5 engaging in his previous occupations. 20 C.F.R. § 404.1520(a). If the claimant  
6 cannot do his past relevant work, the ALJ proceeds to step five, and the burden  
7 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
8 other work, and (2) the claimant can perform specific jobs which exist in the  
9 national economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94  
10 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the  
11 national economy, he is found “disabled.” 20 C.F.R. § 404.1520(a)(4)(v).

#### 12 **ADMINISTRATIVE DECISION**

13 On March 13, 2017, the ALJ issued a decision finding Plaintiff was not  
14 disabled as defined in the Social Security Act from June 1, 2012 through the date  
15 of the decision. The ALJ found that Plaintiff had met the insured status for  
16 Disability Insurance benefits through December 31, 2013. Tr. 30.

17 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
18 activity from June 1, 2012; through December 31, 2013. Tr. 30.

19 At step two, the ALJ determined that Plaintiff had the following severe  
20 impairment: history of thoracic spine fracture with kyphosis. Tr. 30.

21 At step three, the ALJ found that Plaintiff did not have an impairment or  
22 combination of impairments that met or medically equaled the severity of one of  
23 the listed impairments. Tr. 32.

24 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
25 determined he could perform a range of light work with the following limitations:

26 [T]he claimant can occasionally balance, stoop, kneel, or crouch. He  
27 may not climb or crawl. He must have no exposure to vibrations. The  
28 claimant must take precautions due to possible seizures, including

1 avoiding exposure to unprotected moving mechanical parts or  
2 unprotected blades. He must avoid unenclosed or unprotected heights,  
3 and working near large and unprotected bodies of water, or vats or tubs  
of liquids.

4 Tr. 32. The ALJ identified Plaintiff's past relevant work as stores laborer,  
5 industrial truck operator, furniture assembler, industrial cleaner, automobile  
6 detailer, and tractor trailer driver and found that he could not perform this past  
7 relevant work. Tr. 36.

8 At step five, the ALJ determined that, considering Plaintiff's age, education,  
9 work experience and residual functional capacity, and based on the testimony of  
10 the vocational expert, there were other jobs that exist in significant numbers in the  
11 national economy Plaintiff could perform, including the jobs of cashier II, fast food  
12 worker, and housekeeping cleaner. Tr. 38. The ALJ concluded Plaintiff was not  
13 under a disability within the meaning of the Social Security Act from June 1, 2012,  
14 through the date last insured, December 31, 2013. Id.

## 15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's  
17 decision denying benefits and, if so, whether that decision is based on proper legal  
18 standards. Plaintiff contends the ALJ erred by (1) failing to properly address  
19 Plaintiff's symptom statements, (2) failing to properly address the medical  
20 opinions in the file, and (3) failing to fully develop the record.

## 21 DISCUSSION<sup>2</sup>

### 22 1. Plaintiff's Symptom Statements

23 Plaintiff contests the ALJ's determination that his symptom statements were  
24 unreliable. ECF No. 14 at 6-13.

25 It is generally the province of the ALJ to make determinations regarding the  
26 reliability of Plaintiff's symptom statements, Andrews, 53 F.3d at 1039, but the

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27  
28 <sup>2</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held

1 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,  
2 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
3 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
4 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*  
5 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:  
6 rather the ALJ must identify what testimony is not credible and what evidence  
7 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

8 The ALJ found Plaintiff's statements concerning the intensity, persistence,  
9 and limiting effects of his symptoms to be "not entirely consistent with the medical  
10 evidence and other evidence in the record." Tr. 35. Specifically, the ALJ found  
11 that Plaintiff's symptom statements were inconsistent with (1) the medical  
12 evidence, (2) receipt of a commercial driver's license (CDL), and (3) applying for  
13 a job he could perform. Tr. 35.

#### 14 **A. Medical Evidence**

15 An ALJ may cite inconsistencies between a claimant's testimony and the  
16 objective medical evidence in discounting the claimant's testimony. *Bray v.*  
17 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). See *Lester*, 81  
18 F.3d at 834 (ALJ may not discredit the claimant's testimony as to subjective  
19 symptoms merely because they are unsupported by objective evidence); but see  
20 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (Although it cannot serve  
21 as the sole ground for rejecting a claimant's credibility, objective medical evidence

22 \_\_\_\_\_  
23 that ALJs of the Securities and Exchange Commission are "Officers of the United  
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies  
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in  
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161  
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not  
28 specifically addressed in an appellant's opening brief).

1 is a “relevant factor in determining the severity of the claimant’s pain and its  
2 disabling effects.”)

3 Here, the ALJ summarized Plaintiff’s symptom statements and summarized  
4 the objective medical evidence in the file. Tr. 33-35. However, he never linked  
5 specific testimony to specific evidence to demonstrate any inconsistencies. Id.  
6 Defendant argues that the ALJ’s findings were still sufficient because “reasonable  
7 inferences” could be drawn from the decision. ECF No. 15 at 11. However, the  
8 “clear and convincing standard is the most demanding required in Social Security  
9 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) citing *Moore v.*  
10 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). Therefore,  
11 Defendants’ reasonable inferences standard is insufficient under the clear and  
12 convincing standard.

### 13 **B. CDL**

14 Plaintiff challenged the determination that his application for and receipt of a  
15 CDL was inconsistent with his symptom statements. ECF No. 14 at 11-12. The  
16 ALJ found that a receipt of a CDL includes a medical examination subject to  
17 federal and state regulations with physical qualifications certified by a medical  
18 examiner that the individual is qualified or conditionally qualified to perform the  
19 job. Tr. 35. Therefore, the receipt of such a certification was inconsistent with  
20 Plaintiff’s allegations. Id. Defendant raises no objection to Plaintiff’s challenge.  
21 ECF No. 15 at 8-12.

### 22 **C. Work Activity**

23 Plaintiff also challenged the ALJ’s determination that his symptom  
24 statements were inconsistent with applying for a job and working after the date last  
25 insured. ECF No. 14 at 11. Defendant presents no defense to Plaintiff’s challenge,  
26 but concedes the issue by stating “not all of the ALJ’s reasons for rejecting a  
27 claimant’s allegations need be valid for the determination to be upheld.” ECF No.  
28 15 at 12.

1 By not addressing Plaintiff's receipt of the CDL and conceding that his work  
2 history was not sufficient to support the ALJ's determination, Defendant relies  
3 solely on the ALJ's finding that Plaintiff's symptom statements were inconsistent  
4 with the medical evidence. This is not enough to support the ALJ's determination.  
5 Rollins, 261 F.3d at 857. Therefore, the case is remanded for the ALJ to properly  
6 address Plaintiff's symptom statements.

## 7 **2. Medical Opinions**

8 Plaintiff argues the ALJ's determination giving great weight to the opinion  
9 of Robert Hoskins, M.D. was not supported by substantial evidence. ECF No. 14  
10 at 13-15. Considering the case is being remanded for additional proceedings, the  
11 ALJ will readdress medical opinions in the file.

## 12 **3. Develop the Record**

13 Plaintiff argues that the ALJ failed to fully develop the record by failing to  
14 order a consultative examination or obtain medical expert testimony at a hearing.  
15 ECF No. 14 at 16-19.

16 "In Social Security cases the ALJ has a special duty to fully and fairly  
17 develop the record and to assure that the claimant's interests are considered."  
18 Smolen, 80 F.3d at 1288. This duty is triggered when the evidence is ambiguous or  
19 when the record is inadequate to allow for a proper evaluation. *Mayer v.*  
20 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001).

21 Here, the Court need not make any finding that the record was ambiguous or  
22 inadequate because the case is already being remanded for other reasons. See  
23 *supra*. However, upon remand, the ALJ will call a medical expert to address  
24 Plaintiff's physical impairments during the relevant time period, provide an  
25 opinion regarding Plaintiff's residual functional capacity, and be subject to cross  
26 examination by Plaintiff's representative.

## 27 **REMEDY**

28 Plaintiff urges the Court to apply the credit-as-true rule and remand this case



1 for an immediate award of benefits. ECF No. 14 at 13.

2 The decision whether to remand for further proceedings or reverse and  
3 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
4 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule, where (1) the  
5 record has been fully developed and further administrative proceedings would  
6 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons  
7 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if  
8 the improperly discredited evidence were credited as true, the ALJ would be  
9 required to find the claimant disabled on remand, we remand for an award of  
10 benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even when the  
11 three prongs have been satisfied, the Court will not remand for immediate payment  
12 of benefits if “the record as a whole creates serious doubt that a claimant is, in fact,  
13 disabled.” *Garrison*, 759 F.3d at 1021.

14 Here, the record as a whole in this case creates serious doubt that Plaintiff is  
15 disabled during the relevant period. However, due to the need for the ALJ to  
16 readdress Plaintiff’s symptom statements, remand for further proceedings is proper  
17 in this case. Additionally, the ALJ will call a medical expert to provide testimony  
18 regarding Plaintiff’s impairments during the relevant period, to provide a residual  
19 functional capacity opinion during the relevant period, and to be subject to cross  
20 examination by Plaintiff’s representative.

## 21 CONCLUSION

22 Accordingly, **IT IS ORDERED:**

- 23 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is  
24 **DENIED**.
- 25 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is  
26 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings  
27 consistent with this Order.
- 28 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order and provide a copy  
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
3 and the file shall be **CLOSED**.

4 DATED April 30, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE