

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

Mar 24, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRANDON W.,¹

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner
of Social Security,

Defendant.

No. 4:20-CV-5073-EFS

**ORDER DENYING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.²

Plaintiff Brandon W. appeals the denial of benefits by the Administrative Law Judge (ALJ). He alleges the ALJ erred by 1) discounting his symptom reports, 2) failing to properly consider lay statements, 3) improperly weighing the a medical opinion, 4) improperly determining that his impairments did not meet or equal a

¹ To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or by "Plaintiff." See LCivR 5.2(c).

² ECF Nos. 16 & 17.

1 listing, and 5) improperly assessing his residual functional capacity and therefore
2 relying on an incomplete hypothetical at step five. In contrast, Defendant
3 Commissioner of Social Security asks the Court to affirm the ALJ's decision finding
4 Plaintiff not disabled. After reviewing the record and relevant authority, the Court
5 denies Plaintiff's Motion for Summary Judgment, ECF No. 16, and grants the
6 Commissioner's Motion for Summary Judgment, ECF No. 17.

7 I. Five-Step Disability Determination

8 A five-step sequential evaluation process is used to determine whether an
9 adult claimant is disabled.³ Step one assesses whether the claimant is currently
10 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
11 gainful activity, benefits are denied.⁵ If not, the disability-evaluation proceeds to
12 step two.⁶

13 Step two assesses whether the claimant has a medically severe impairment,
14 or combination of impairments, which significantly limits the claimant's physical
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19 ³ 20 C.F.R. §§ 404.1520(a), 416.920(a).

20 ⁴ *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

21 ⁵ *Id.* §§ 404.1520(b), 416.920(b).

22 ⁶ *Id.* §§ 404.1520(b), 416.920(b).

1 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
2 denied.⁸ If the claimant does, the disability-evaluation proceeds to step three.⁹

3 Step three compares the claimant's impairment(s) to several recognized by
4 the Commissioner to be so severe as to preclude substantial gainful activity.¹⁰ If an
5 impairment meets or equals one of the listed impairments, the claimant is
6 conclusively presumed to be disabled.¹¹ If an impairment does not, the disability-
7 evaluation proceeds to step four.

8 Step four assesses whether an impairment prevents the claimant from
9 performing work he performed in the past by determining the claimant's residual
10 functional capacity (RFC).¹² If the claimant is able to perform prior work, benefits
11 are denied.¹³ If the claimant cannot perform prior work, the disability-evaluation
12 proceeds to step five.

13 Step five, the final step, assesses whether the claimant can perform other
14 substantial gainful work—work that exists in significant numbers in the national
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16 ⁷ 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 ⁸ *Id.* §§ 404.1520(c), 416.920(c).

18 ⁹ *Id.* §§ 404.1520(c), 416.920(c).

19 ¹⁰ *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

20 ¹¹ *Id.* §§ 404.1520(d), 416.920(d).

21 ¹² *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

22 ¹³ *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

1 economy—considering the claimant’s RFC, age, education, and work experience.¹⁴

2 If so, benefits are denied. If not, benefits are granted.¹⁵

3 The claimant has the initial burden of establishing entitlement to disability
4 benefits under steps one through four.¹⁶ At step five, the burden shifts to the
5 Commissioner to show that the claimant is not entitled to benefits.¹⁷

6 II. Factual and Procedural Summary

7 Plaintiff filed Title II and XVI applications, alleging a disability onset date of
8 March 30, 2016.¹⁸ His claims were denied initially and upon reconsideration.¹⁹ A
9 video administrative hearing was held before Administrative Law Judge Carol
10 Moore.²⁰

11 In denying Plaintiff’s disability claims, the ALJ made the following findings:

- 12 • Plaintiff met the insured status requirements through March 31,
13 2017;

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15 ¹⁴ 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
16 1497-98 (9th Cir. 1984).

17 ¹⁵ 20 C.F.R. §§ 404.1520(g), 416.920(g).

18 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

19 ¹⁷ *Id.*

20 ¹⁸ AR 228-32 & 236-42.

21 ¹⁹ AR 135-52 & 155-66.

22 ²⁰ AR 46-86.

- 1 • Step one: Plaintiff had not engaged in substantial gainful activity
2 since the alleged March 30, 2016 onset date;
- 3 • Step two: Plaintiff had the following medically determinable severe
4 impairments: grade-1 retrolisthesis L4-5 and sleep disorders
5 diagnosed as insomnia, hypersomnia, and narcolepsy;
- 6 • Step three: Plaintiff did not have an impairment or combination of
7 impairments that met or medically equaled the severity of one of the
8 listed impairments;
- 9 • RFC: Plaintiff had the RFC to perform light work except:
 - 10 ▪ He should never climb ladders, ropes, or scaffolds, but he can
11 occasionally climb ramps and stairs;
 - 12 ▪ He should never crawl, but he can occasionally balance, stoop,
13 kneel, and crouch;
 - 14 ▪ He should not have exposure to hazards such as moving
15 machinery and unprotected heights;
 - 16 ▪ His work should not include driving;
 - 17 ▪ He can tolerate frequent exposure to extreme cold and
18 vibration; and
 - 19 ▪ Consistent with light exertion, he can lift/carry 20-pounds
20 occasionally and 10-pounds frequently and he can sit 6-hours
21 and stand/walk 2-hours during an 8-hour workday; however,
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1 after an hour of sitting, standing, or walking, he should
2 change positions;

- 3 • Step four: Plaintiff was not capable of performing past relevant work;
4 and
5 • Step five: considering Plaintiff's RFC, age, education, and work
6 history, Plaintiff could perform work that existed in significant
7 numbers in the national economy, such as office helper, parking lot
8 attendant, and mail clerk.²¹

9 When assessing the medical-opinion evidence, the ALJ gave:

- 10 • significant weight to the testifying medical opinion of Samuel
11 Berman, M.D.; the examining opinion of Lynn Orr, Ph.D., and the
12 reviewing opinions of Donna Lavallie, D.O., John Robinson, Ph.D.,
13 and Dan Donahue, Ph.D.; and
14 • less weight to the opinion of Jason England, ARNP.²²

15 The ALJ also found Plaintiff's medically determinable impairments could
16 reasonably be expected to cause some of the alleged symptoms, but his statements
17 concerning the intensity, persistence, and limiting effects of those symptoms were
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21 ²¹ AR 24-45.

22 ²² AR 35-37.

1 not entirely consistent with the medical evidence and other evidence in the
2 record.²³ Likewise, the ALJ discounted the lay statements from Plaintiff's wife.²⁴

3 Plaintiff requested review of the ALJ's decision by the Appeals Council,
4 which denied review.²⁵ Plaintiff timely appealed to this Court.

5 III. Standard of Review

6 A district court's review of the Commissioner's final decision is limited.²⁶ The
7 Commissioner's decision is set aside "only if it is not supported by substantial
8 evidence or is based on legal error."²⁷ Substantial evidence is "more than a mere
9 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
10 mind might accept as adequate to support a conclusion."²⁸ Moreover, because it is
11 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
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17 ²³ AR 32-38.

18 ²⁴ AR 37.

19 ²⁵ AR 1-6.

20 ²⁶ 42 U.S.C. § 405(g).

21 ²⁷ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

22 ²⁸ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).
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1 upholds the ALJ's findings "if they are supported by inferences reasonably drawn
2 from the record."²⁹ The Court considers the entire record as a whole.³⁰

3 Further, the Court may not reverse an ALJ decision due to a harmless
4 error.³¹ An error is harmless "where it is inconsequential to the [ALJ's] ultimate
5 nondisability determination."³² The party appealing the ALJ's decision generally
6 bears the burden of establishing harm.³³

7 IV. Analysis

8 **A. Plaintiff's Symptom Reports: Plaintiff fails to establish** 9 **consequential error.**

10 Plaintiff argues the ALJ failed to provide valid reasons for rejecting his
11 symptom reports. When examining a claimant's symptom reports, the ALJ must
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13 ²⁹ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

14 ³⁰ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must
15 consider the entire record as whole, weighing both the evidence that supports and
16 the evidence that detracts from the Commissioner's conclusion," not simply the
17 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th
18 Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such
19 evidence was not considered[.]").

20 ³¹ *Molina*, 674 F.3d at 1111.

21 ³² *Id.* at 1115 (quotation and citation omitted).

22 ³³ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 make a two-step inquiry. “First, the ALJ must determine whether there is objective
2 medical evidence of an underlying impairment which could reasonably be expected
3 to produce the pain or other symptoms alleged.”³⁴ Second, “[i]f the claimant meets
4 the first test and there is no evidence of malingering, the ALJ can only reject the
5 claimant’s testimony about the severity of the symptoms if [the ALJ] gives ‘specific,
6 clear and convincing reasons’ for the rejection.”³⁵ Here, the ALJ found Plaintiff’s
7 statements concerning the intensity, persistence, and limiting effects of his
8 symptoms inconsistent with the objective medical evidence and his activities. The
9 ALJ also discounted Plaintiff’s symptom reports because he appeared to be
10 motivated to seek disability for non-disability purposes based on his inconsistent
11 statements, apparent lack of effort during the psychological examination, sporadic
12 work history, failure to follow medical advice, and use of marijuana.³⁶

13 First, as to the ALJ’s finding that Plaintiff’s symptom reports were
14 inconsistent with the objective medical evidence, symptom reports cannot be solely
15 discounted on the grounds that they were not fully corroborated by the objective
16 medical evidence.³⁷ However, objective medical evidence is a relevant factor in
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18 ³⁴ *Molina*, 674 F.3d at 1112.

19 ³⁵ *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504
20 F.3d at 1036).

21 ³⁶ AR 32-38.

22 ³⁷ See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
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1 considering the severity of the reported symptoms.³⁸ “Objective medical evidence”
2 means signs, laboratory findings, or both.³⁹ In turn, “signs” is defined as:

3 one or more anatomical, physiological, or psychological abnormalities
4 that can be observed, apart from [the claimant’s] statements
5 (symptoms). Signs must be shown by medically clinical diagnostic
6 techniques. Psychiatric signs are medically demonstrable phenomena
7 that indicate specific psychological abnormalities, e.g., abnormalities
of behavior, mood, thought, memory, orientation, development, or
perception, and must also be shown by observable facts that can be
medically described and evaluated.⁴⁰

8 Evidence obtained from the “application of a medically acceptable clinical
9 diagnostic technique, such as evidence of reduced joint motion, muscle spasm,
10 sensory deficits, or motor disruption” is considered objective medical evidence.⁴¹

11 Here, although x-rays revealed age indeterminate grade-1 retrolisthesis of
12 L4 on L5, Plaintiff regularly had normal muscle strength, intact coordination, and
13 gait.⁴² And as the ALJ highlighted, treating physician Jonathan Salahshour, M.D.
14 declined to prepare a letter that Plaintiff was unable to work because Plaintiff’s

17 ³⁸ *Id.*

18 ³⁹ 20 C.F.R. §§ 404.1502(f), 416.902(k).

19 ⁴⁰ *Id.* §§ 404.1502(g), 416.902(l).

20 ⁴¹ 3 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical evidence
21 (2019).

22 ⁴² AR 338-39, 354-60, 375, 378, 380, 403, 406, 439, 443, & 454.
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1 pain level was significantly reduced from his last visit.⁴³ In addition, Plaintiff
2 routinely appeared orientated, in no distress, and with normal mood/affect,
3 memory and ability to concentrate.⁴⁴ During his psychological examination with
4 Dr. Lynn Orr, Plaintiff's remote memory was reasonably good, he had no problem
5 with his concentration or fund of knowledge, and while his recent and immediate
6 memory showed impairment, Dr. Orr questioned whether Plaintiff gave his best
7 effort on the Wechsler Memory Scale test as his results indicated a high probability
8 of malingering.⁴⁵ Dr. Lynn concluded "there is nothing significant[ly] evident that
9 would impair [Plaintiff's] ability to maintain sustained concentration and
10 persistence and make adequate adaptations."⁴⁶ There is substantial evidence to
11 support the ALJ's finding that Plaintiff's reported disabling physical and mental
12 symptoms were inconsistent with the objective medical record. This was a relevant
13 factor for the ALJ to consider when assessing Plaintiff's symptom reports.

14 Second, the ALJ discounted Plaintiff's symptom reports because they were
15 inconsistent with his activities. If a claimant can spend a substantial part of the
16 day engaged in pursuits involving the performance of exertional or non-exertional
17 functions, the ALJ may find these activities inconsistent with the reported
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19 ⁴³ AR 373.

20 ⁴⁴ AR 338-39, 354, 391, 395, 399, & 406.

21 ⁴⁵ AR 364-66.

22 ⁴⁶ AR 367.

1 disabling symptoms.⁴⁷ The ALJ highlighted that Plaintiff completed some college
2 accounting classes, takes care of his special-needs young children while his wife
3 works during the day (including feeding the children, putting them down for naps,
4 taking them to the park, and watching movies with them), travels monthly to
5 Seattle and every three months to Boston for children's doctors' appointments,
6 manages finances, performs personal care, cooks, shops, watches television, uses a
7 computer, attends church, and socializes with family and friends.⁴⁸ While several
8 of these activities could be done spaced out throughout the day or week and
9 thereby allow Plaintiff to rest, the Court finds the ALJ's finding—that Plaintiff's
10 activities are inconsistent with his reported symptoms of chronic fatigue and pain
11 resulting in the inability to sustain work—as rational and supported by substantial
12 evidence. Based on Plaintiff's reports to medical providers and Dr. Orr, Plaintiff
13 cooks meals from scratch a good deal of the time, cares for (without the need to
14 take a nap) his two children, and attends social or church activities at least six
15 times a month.⁴⁹ Similarly, although Plaintiff advised the medical providers
16 treating his sleeping difficulties that he was tired, he relayed that he did not nap
17 during the day.⁵⁰ On this record, the ALJ rationally found Plaintiff's activities were
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19 ⁴⁷ *Molina*, 674 F.3d at 1113.

20 ⁴⁸ AR 30-38.

21 ⁴⁹ AR 363-68.

22 ⁵⁰ AR 390, 394, & 398.

1 inconsistent with his disabling complaints. This finding was sufficiently articulated
2 by the ALJ considering the record and constitutes a clear and convincing reason to
3 discount Plaintiff's symptoms.

4 Third, the ALJ discounted Plaintiff's symptom reports because Plaintiff
5 appeared to be motivated by non-disability purposes. The ALJ based this finding,
6 in part, on Plaintiff's inconsistent statements (including about his symptoms and
7 level of activity), failure to give full effort during his psychological examination
8 with Dr. Orr, and sporadic work history. An ALJ may discount a claimant's
9 symptom reports on the basis of inconsistent statements and a tendency to
10 exaggerate or engage in conduct to manipulate the disability-determination
11 process.⁵¹ Here, the ALJ highlighted that contrary to Plaintiff's complaints during
12 the disability process of disabling back pain and chronic daytime fatigue, Plaintiff
13 did not report such work-restrictive symptoms to his medical providers.⁵² Plaintiff
14 reported some physical back pain to his medical providers but did not report that it
15 prohibited him from engaging in daily activities or work.⁵³ Plaintiff told those

17 ⁵¹ See *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (The ALJ may consider
18 "ordinary techniques of credibility evaluation," such as reputation for lying, prior
19 inconsistent statements concerning symptoms, and other testimony that "appears
20 less than candid."); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

21 ⁵² AR 35-36 (citing AR 389-95 & 404-27).

22 ⁵³ See, e.g., AR 355, 376-77, 379-81, 452-53.
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1 treating his sleeping disorders that although he was tired and that his ability to
2 perform daily functions at home was impaired due to concentration and memory
3 difficulties, he did not take daytime naps and that within six months of treatment
4 his sleep improved.⁵⁴ The ALJ rationally interpreted Plaintiff as offering
5 inconsistent symptom reports to his treatment providers as compared to those he
6 made during the disability process. In addition, the ALJ rationally found that
7 Plaintiff offered varying accounts as to the extent and scope of his daily activities
8 and functional limitations.⁵⁵ The ALJ also rationally relied on Dr. Orr's finding
9 that Plaintiff did not appear to give his best effort on the psychological testing and
10 appeared to be malingering.⁵⁶ In addition, the ALJ rationally highlighted that
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12 ⁵⁴ AR 389-406. *See Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599-600
13 (9th Cir. 1999) (considering evidence of improvement). *See also* AR 353 & 450
14 (noting no sleep disturbance).

15 ⁵⁵ *Compare* AR 71 (telling SSA that his wife handles most of the food preparation
16 and that his wife stands in the bathroom while he baths in case he falls asleep)
17 *with* AR 366 (telling Dr. Orr that he cooks a good deal of the time, makes meals
18 from scratch, and is able to perform self-care without assistance).

19 ⁵⁶ AR 366-67. *See Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012)
20 (recognizing that an ALJ may discount a claimant's reported symptoms if the
21 claimant was observed by an evaluator as not exerting adequate effort during
22 testing).
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1 Plaintiff had a sporadic work history and told Dr. Orr that he had a history of
2 being in/out of jail and then, a mere three days after his evaluation with Dr. Orr, a
3 treatment note reflects that Plaintiff was likely to get jail time and was requesting
4 a letter stating that he was unable to work due to pain—a letter which was not
5 approved by the treating physician.⁵⁷ The ALJ’s decision to discount Plaintiff’s
6 reported disability symptoms because his decision to seek disability appeared to be
7 motivated for non-disability reasons is supported by substantial evidence and is a
8 clear and convincing reason to discount Plaintiff’s reported disability symptoms.

9 The ALJ also questioned Plaintiff’s motivation for seeking disability because
10 he continued to smoke cigarettes contrary to medical advice, he declined to take
11 medication for anxiety or participate in counseling, and he continued to smoke
12 marijuana and offered inconsistent statements as to his marijuana use. The ALJ
13 erred in these regards. There is no medical evidence that Plaintiff’s continued
14 smoking of cigarettes caused or exacerbated his back or sleeping impairments.
15 And the record reflects that Plaintiff declined to take the discussed medications as
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18 ⁵⁷ AR 37 (citing AR 364 & 373 (“Patient called stating he has court on 9/19/16 and
19 could possibly due jail time, he is wanting to know if we can write a letter stating
20 he is unable to work at this time due to his pain.”)). See *Thomas v. Barnhart*, 278
21 F.3d 947, 959 (9th Cir. 2002); 20 C.F.R. § 404.1529 (work record can be considered
22 in assessing reported symptoms); 20 C.F.R. § 416.929 (same).
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1 Plaintiff reported a poor response to such medications previously.⁵⁸ In addition, the
2 ALJ's decision to discount Plaintiff's credibility because he declined to engage in
3 counseling is not supported by substantial evidence on this record because the
4 same treatment note indicated that the medical provider believed that Plaintiff's
5 anxiety may be related to chronic illness or a genetic disorder rather than to a
6 mental health condition for which counseling would assist.⁵⁹ Finally, the ALJ's
7 finding that Plaintiff offered inconsistent statements about his marijuana use
8 during the period at issue is supported by substantial evidence, however, it is not a
9 clear and convincing reason to discount his credibility on this record. No treatment
10 note indicated that Plaintiff's marijuana use—which is legal in Washington—
11 caused or exacerbated his impairments. Without further articulation and findings
12 by the ALJ, that Plaintiff offered varying reports about his marijuana use is not a
13 clear and convincing reason to discount the reliability of his testimony.

14 Nonetheless, these errors are harmless because the ALJ offered other clear and
15 convincing reasons supported by substantial evidence for discounting Plaintiff's
16 reported symptoms.⁶⁰

18 ⁵⁸ See SSR 18-3p; *see also* POMS DI 23010.009 (“Prescribed treatment does not
19 include lifestyle modifications, such as dieting, exercise, or smoking cessation.”).

20 ⁵⁹ AR 457.

21 ⁶⁰ See *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir.
22 2008); *Molina*, 674 F.3d at 1115 (“[S]everal of our cases have held that an ALJ’s
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1 In summary, Plaintiff fails to establish the ALJ consequentially erred.

2 **B. Lay Witness: Plaintiff fails to establish error.**

3 The ALJ discounted Plaintiff's wife's statements about Plaintiff's fatigue and
4 associated memory and attention difficulties because they were inconsistent with
5 Plaintiff's activities and functioning.⁶¹ "Testimony by a lay witness provides an
6 important source of information about a claimant's impairments, and an ALJ can
7 reject it only by giving specific reasons germane to each witness."⁶² Here, the ALJ
8 rationally discounted the wife's statements for the same reasons the ALJ
9 discounted Plaintiff's similar symptom statements.⁶³ Plaintiff fails to establish error
10 by the ALJ.

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14 error was harmless where the ALJ provided one or more invalid reasons for
15 disbelieving a claimant's testimony, but also provided valid reasons that were
16 supported by the record."); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190,
17 1197 (9th Cir. 2004) (holding that any error the ALJ committed in asserting one
18 impermissible reason for claimant's lack of credibility did not negate the validity of
19 the ALJ's ultimate conclusion that the claimant's testimony was not credible).

20 ⁶¹ AR 37 (citing AR 333-34).

21 ⁶² *Regennitter v. Comm'r*, 166 F.3d 1294, 1298 (9th Cir. 1999).

22 ⁶³ *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

1 **C. Medical Opinions: Plaintiff fails to establish consequential error.**

2 Plaintiff challenges the ALJ's assignment of little weight to the treating
3 opinion of Jason England, ARNP. As discussed below, the Court finds the ALJ's
4 weighing of Nurse England's opinion was supported by substantial evidence.

5 1. Standard

6 The weighing of medical opinions is dependent upon the nature of the
7 medical relationship, i.e., 1) a treating physician, 2) an examining physician who
8 examines but did not treat the claimant, and 3) a reviewing physician who neither
9 treated nor examined the claimant.⁶⁴ Generally, more weight is given to the
10 opinion of a treating physician than to an examining physician's opinion and both
11 treating and examining opinions are to be given more weight than the opinion of a
12 reviewing physician.⁶⁵

13 When a treating physician's or evaluating physician's opinion is not
14 contradicted by another physician, it may be rejected only for "clear and
15 convincing" reasons, and when it is contradicted, it may be rejected for "specific
16 and legitimate reasons" supported by substantial evidence.⁶⁶ A reviewing
17 physician's opinion may be rejected for specific and legitimate reasons supported by
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⁶⁴ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

21 ⁶⁵ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

22 ⁶⁶ *Lester*, 81 F.3d at 830.
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1 substantial evidence, and the opinion of an “other” medical source⁶⁷ may be
2 rejected for specific and germane reasons supported by substantial evidence.⁶⁸ The
3 opinion of a reviewing physician serves as substantial evidence if it is supported by
4 other independent evidence in the record.⁶⁹

5 2. Nurse England

6 Nurse England treated Plaintiff, and on August 2, 2018, provided a medical
7 opinion.⁷⁰ Nurse England noted that the sleep specialist had diagnosed Plaintiff
8 with insomnia, hypertension, and narcolepsy, and stated that Plaintiff “feels he
9 would have to miss [2-3 days of work a month] with his sleep
10 disturbance/narcolepsy history” and that Plaintiff would be off-task 21-30 percent
11 of the work week.⁷¹

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13 ⁶⁷ See 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable
14 medical sources are licensed physicians, licensed or certified psychologists, licensed
15 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
16 audiologists, licensed advanced practice registered nurses, and licensed physician
17 assistants within their scope of practice—all other medical providers are “other”
18 medical sources.).

19 ⁶⁸ *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

20 ⁶⁹ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

21 ⁷⁰ AR 337-39, 353-54, 447-51, 465-66, & 469.

22 ⁷¹ AR 465-66.
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1 The ALJ discounted Nurse England's opined limitations because 1) he relied
2 too heavily on Plaintiff's subjective reports about the days he would be absent from
3 work, 2) the limitations were speculative, 3) the off-task limitation was
4 inconsistent with Plaintiff's activities, and 4) Plaintiff refused to take medication
5 for a mental disorder or participate in counseling.⁷²

6 First, the ALJ's finding that Nurse England's limitation that Plaintiff would
7 be absent 2-3 days a month was too reliant on Plaintiff's subjective reports, rather
8 than medical observations or findings, is a rational finding supported by
9 substantial evidence. A medical opinion may be discounted if it is inadequately
10 supported by medical findings and observations.⁷³ Here, notwithstanding that
11 Nurse England reviewed the sleep study identifying that Plaintiff had limited
12 stage 3 sleep and other sleep difficulties, Nurse England expressly stated that his
13 absenteeism limitation was based on Plaintiff's self-reported anticipated absences:
14 "[Patient] *feels* he would have to miss [2-3 days] of work a month with his sleep
15 disturbance/narcolepsy history."⁷⁴ Moreover, the ALJ rationally found there is
16 nothing in Nurse England's own or reviewed treatment records that would support
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18 ⁷² AR 36.

19 ⁷³ *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017); *Bray v. Comm'r of Soc.*
20 *Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Batson*, 359 F.3d at 1195;
21 *Garrison*, 759 F.3d at 1014.

22 ⁷⁴ AR 466 (emphasis added).
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1 absenteeism at this opined rate.⁷⁵ Plaintiff relies on Sophie Gomez, M.D.'s
2 treatment note that Plaintiff's hypersomnia was affecting daytime functioning,⁷⁶
3 but the ALJ rationally found that the record lacked sufficient objective medical
4 findings indicating that Plaintiff's sleep difficulties severely impacted his daytime
5 concentration, social skills, reasoning, and other functioning.⁷⁷ That Nurse
6 England's absenteeism opinion was too heavily based on Plaintiff's reported
7 daytime fatigue symptoms and anticipated absences, rather than objective medical
8 evidence, was a legitimate⁷⁸ reason, supported by substantial evidence, to discount
9 Nurse England's opinion.

12 ⁷⁵ See, e.g., AR 337, 353-54, 429-433, 447-51, & 469.

13 ⁷⁶ AR 406.

14 ⁷⁷ AR 338-39, 354, 391, 395, 399, & 406 (noting that Plaintiff appeared orientated,
15 in no distress, and with normal concentration and memory); AR 364-67 (finding
16 that Plaintiff had the ability to maintain sustained concentration, persistence, and
17 make adequate adaptations).

18 ⁷⁸ The Commissioner submits the germane standard applies to Nurse England's
19 opinion as an ARNP. The Court is unsure whether Nurse England is a licensed
20 ARNP and whether he was offering care within his licensed area. Therefore, the
21 Court applies the higher legitimate standard, rather than the germane standard,
22 in an abundance of caution.

1 Second, the ALJ discounted Nurse England’s absenteeism and attendance
2 limitations because they were speculative. A medical opinion may be given less
3 weight if it is speculative and not based on objective medical findings.⁷⁹ Here,
4 Nurse England’s opined limitations were premised with clauses such as “[Patient]
5 feels” or “[Patient] states” and his treatment notes did not include any observed
6 tiredness that impacted concentration or memory.⁸⁰ The ALJ rationally found that
7 Nurse England’s absenteeism and attendance limitations were speculative. This
8 was a legitimate reason supported by substantial evidence to give less weight to
9 Nurse England’s opinions.

10 Third, the ALJ discounted Nurse England’s off-task limitation because it
11 was inconsistent with Plaintiff’s activities, including caring for his two young
12 children. An ALJ may discount a medical opinion that is inconsistent with the
13 claimant’s level of activity.⁸¹ But “many home activities are not easily transferable
14 to what may be the more grueling environment of the workplace.”⁸² As discussed
15 above, Plaintiff’s activities involved caring for his two young children without the
16 need to take naps. The ALJ rationally found that Plaintiff reported activities to Dr.

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18 ⁷⁹ See *Coaty v. Colvin*, 673 Fed. Appx. 787, 788 (9th Cir. 2017) (affirming ALJ’s
19 determination that medical opinion was speculative).

20 ⁸⁰ AR 465-66.

21 ⁸¹ *Rollins*, 261 F.3d at 856.

22 ⁸² *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

1 Orr that were inconsistent with Nurse England's off-task limitation. Moreover,
2 even if the ALJ erred by discounting Nurse England's opinion on the grounds that
3 it was inconsistent with Plaintiff's activities, any error was harmless because the
4 ALJ offered two other supported reasons for discounting Nurse England's
5 opinion.⁸³

6 Finally, the ALJ discounted Nurse England's opinions because Plaintiff
7 refused to take medication for a mental disorder or participate in counseling. As
8 discussed above, these were not legitimate reasons supported by substantial
9 evidence to discount Nurse England's opinions. First, because during the same
10 appointment that the treating provider recommended counseling, the treating
11 provider also mentioned that Plaintiff's anxiety may be due to chronic back pain or
12 a genetic condition. Second, Plaintiff declined certain medications because he
13 previously had a poor response to the medications.⁸⁴ The ALJ's errors were
14 inconsequential though to the ALJ's overall weighing of Nurse England's opinion.

15 **D. Step Three (Listings): Plaintiff fails to establish error.**

16 Plaintiff contends the ALJ erred by failing to consider Listing 11.02 for
17 Plaintiff's sleep impairments of insomnia, hypersomnia, and narcolepsy and by
18 providing nothing more than a boilerplate listing denial.

20 ⁸³ See *Carmickle*, 533 F.3d at 1162 (requiring the error to be consequential to the
21 disability analysis).

22 ⁸⁴ AR 457.

1 The ALJ is obligated to consider the relevant evidence to determine whether
2 a claimant's impairments meet or equal one of the specified impairments set forth
3 in the listings.⁸⁵ Generally, a “boilerplate finding is insufficient to support a
4 conclusion that a claimant's impairment does not [meet or equal a
5 listing].”⁸⁶ However, the ALJ need not recite the reasons for her step-three
6 determination under the listings portion of the decision so long as the relevant
7 evidence and underlying findings are discussed in the ALJ's decision.⁸⁷ Moreover, a
8 boilerplate finding may be appropriate where a claimant fails to set forth any
9 evidence for the ALJ to conclude an impairment could meet or equal a listing.⁸⁸

10 The ALJ’s listings’ finding was boilerplate: “The medical evidence does not
11 document listing-level severity, and no acceptable medical source has mentioned
12 findings equivalent in severity to the criteria of any listed impairment, individually
13 or in combination.”⁸⁹ However, no step-three error occurred. The ALJ offered
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15

16 ⁸⁵ *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir.2001); 20 C.F.R. § 416.920(a)(4)(iii).

17 ⁸⁶ *Lewis*, 236 F.3d at 512; *see also Marcia v. Sullivan*, 900 F.2d 172, 176 (9th
18 Cir.1990) (noting that the ALJ's unexplained finding at step three was reversible
19 error).

20 ⁸⁷ *Lewis*, 236 F.3d at 513.

21 ⁸⁸ *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990).

22 ⁸⁹ AR 31.

1 sufficient analysis in later portions of the decision and the underlying record
2 contains sufficient evidence to support her findings.⁹⁰

3 Moreover, Plaintiff fails to present sufficient evidence as to Listing 11.02,
4 under which Plaintiff's sleep disorders are evaluated.⁹¹ Plaintiff did not identify
5 what 11.02 criteria he has satisfied. Although Plaintiff's polysomnography sleep
6 study showed that he has limited stage 3 and REM sleep, the medical record is
7 largely devoid of any observed fatigue and resulting memory or concentration
8 difficulties.⁹² And Dr. Orr found that Plaintiff "demonstrated good remote memory,
9 good fund of knowledge, good concentration[,] good abstract thinking and
10 reasonably good insight and judgment."⁹³ Finally, no medical expert opined that
11 Plaintiff met the requirements of Listing 11.02. The Court finds no reason to
12 disturb the ALJ's step-three finding.

13 **E. RFC: Plaintiff fails to establish error.**

14 Plaintiff argues the ALJ failed to properly include all of his limitations into
15 the RFC, including his need to be absent two to three days per month, the need for
16 extra breaks totaling two to three hours per day, and the need to be off task ten
17

18 ⁹⁰ *Molina*, 674 F.3d at 1112; SSR 17-2p.

19 ⁹¹ POMS DI 24580.005C, *Evaluation of Narcolepsy*,
20 <https://secure.ssa.gov/apps10/poms.nsf/lnx/0424580005>.

21 ⁹² *See generally* 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 11.02.

22 ⁹³ AR 367.

1 percent or more of the time. “[T]he ALJ is responsible for translating and
2 incorporating clinical findings into a succinct RFC.”⁹⁴ Plaintiff’s RFC-argument
3 merely restates Plaintiff’s earlier allegations of error, which are not supported by
4 the record. The RFC properly accounted for the limitations supported by the
5 record.⁹⁵

6 **V. Conclusion**

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

- 8 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.
9 2. The Commissioner’s Motion for Summary Judgment, **ECF No. 17**, is
10 **GRANTED**.
11 3. The Clerk’s Office shall enter **JUDGMENT** in favor of the
12 Commissioner.
13 4. The case shall be **CLOSED**.

14 **IT IS SO ORDERED.** The Clerk’s Office is directed to file this Order and
15 provide copies to all counsel.

16 **DATED** this 24th day of March 2020.

17 

18 _____
19 EDWARD F. SHEA
Senior United States District Judge

20
21 _____
22 ⁹⁴ *Rounds v. Comm’r of Soc. Sec. Adm.*, 807 F.3d 996, 1006 (9th Cir. 2015).

23 ⁹⁵ *See Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989).