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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 KEIL STEINKE,

8 Plaintiff,

Case No. C15-1291-RAJ

9 v.

10 CAROLYN W. COLVIN, Acting Commissioner
11 of Social Security,

12 Defendant.

**ORDER REVERSING AND
REMANDING CASE FOR
FURTHER ADMINISTRATIVE
PROCEEDINGS**

13 Keil Steinke seeks review of the denial of his application for Supplemental Security
14 Income and Disability Insurance Benefits. Mr. Steinke contends the ALJ erred by miscalculating
15 the opinions of (1) treating doctor Paul Zarkowski, M.D. and mental health counselor Michael
16 Sibrava, NCC, LMHC, (2) examining psychologist Victoria McDuffee, Ph.D., and (3) the lay
17 witness testimony of Elena Steinke and Elizabeth Tyson. Dkt. 9 at 1. As discussed below, the
18 Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further
19 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

20 **BACKGROUND**

21 In May 2012, Mr. Steinke applied for benefits, alleging disability as of September 1,
22 2009. Tr. 21. Mr. Steinke's applications were denied initially and on reconsideration. Tr. 74-
23 123. After the ALJ conducted a hearing on May 30, 2013, the ALJ issued a decision finding Mr.

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1 Steinke not disabled. Tr. 21-32.

2 THE ALJ'S DECISION

3 Utilizing the five-step disability evaluation process,¹ the ALJ found:

4 **Step one:** Mr. Steinke has not engaged in substantial gainful activity since September 1,
5 2009, the alleged onset date.

6 **Step two:** Mr. Steinke has the following severe impairments: autistic disorder; attention-
7 deficit hyperactivity disorder; affective disorder; and anxiety disorder.

8 **Step three:** These impairments do not meet or equal the requirements of a listed
9 impairment.²

10 **Residual Functional Capacity:** Mr. Steinke can perform a full range of work at all
11 exertional levels but with the following nonexertional limitations: he can perform work
12 limited to simple to moderately-complex tasks with only occasional interaction with the
13 public.

14 **Step four:** Mr. Steinke has no past relevant work.

15 **Step five:** As there are jobs that exist in significant numbers in the national economy that
16 Mr. Steinke can perform, he is not disabled.

17 Tr. 21-32. The Appeals Council denied Mr. Steinke's request for review making the ALJ's
18 decision the Commissioner's final decision. Tr. 1-4.³

19 DISCUSSION

20 A. Paul Zarkowski, M.D. and Michael Sibrava, NCC, LMHC

21 In May 2013 treating physician Dr. Zarkowski and mental health counselor Mr. Sibrava
22 jointly signed a letter discussing Mr. Steinke's symptoms and the functional impact of his Major
23 Depressive Disorder and Generalized Anxiety Disorder. Tr. 390-91. Specifically, the letter
indicates that Mr. Steinke copes with his symptoms by isolating himself and avoiding
interpersonal contact as much as possible, that his symptoms of fatigue, hypersomnia, anhedonia,

¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

³ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 and appetite disruption keep him from starting and engaging in activities and disrupt his ability
2 to concentrate. *Id.* His difficulty focusing and meaningfully engaging in tasks make it difficult
3 for him to complete objectives and goals. *Id.* Moreover, his symptoms interrupt his functioning
4 as exhibited by his irregular attendance in school, multiple enrollments in college and difficulty
5 keeping jobs. *Id.*

6 The ALJ gave this opinion “some weight.” Tr. 29. She indicated that the effect of Mr.
7 Steinke’s depression and anxiety on his ability to concentrate and the interference with his
8 attendance “are accounted for in the above-stated residual functional capacity.” *Id.* However,
9 the ALJ found that Mr. Steinke’s wide range of activities indicated that his limitations are “not as
10 grave as Mr. Sibrava and Dr. Zarkowski allege.” *Id.* Mr. Steinke argues that the ALJ failed to
11 properly address Dr. Zarkowski and Mr. Sibrava’s opinion that his symptoms interfere with his
12 attendance. Dkt. 9 at 5. The Court agrees.

13 An ALJ may not reject the opinion of a treating or examining doctor, even where
14 contradicted by another doctor, without providing specific and legitimate reasons supported by
15 substantial evidence.⁴ *See Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 603-04 (9th
16 Cir. 1999). “Where an ALJ does not explicitly reject a medical opinion or set forth specific,
17 legitimate reasons for crediting one medical opinion over another, he errs.” *Garrison v. Colvin*,
18 759 F.3d 995, 1012-13 (9th Cir. 2014); *see also Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir.

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20 ⁴ Dr. Zarkowski and Mr. Sibrava both signed the same report discussing Mr. Steinke’s
21 impairments and limitations. Tr. 391. Mr. Sibrava is not an accepted medical source and if this
22 were Mr. Sibrava’s opinion alone, rather than written jointly with Dr. Zarkowski, the ALJ would
23 be required to give only germane reasons for rejecting the opinion. *See* 20 C.F.R. § 404.1513(d)
(therapists are considered “other sources” not “accepted medical sources”); *Molina v. Astrue*,
674 F.3d 1104, 1111 (9th Cir. 2011) (an ALJ may discount testimony from “other sources” if he
gives reasons germane to each witness). However, as discussed herein, the ALJ failed to give
any reason (either specific and legitimate or germane) for rejecting the opinion that Mr. Steinke’s
symptoms interfere with his attendance.

1 1995) ([a]n ALJ need not discuss all evidence presented but “may not reject ‘significant
2 probative evidence’ without explanation.”) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1394-95
3 (9th Cir. 1984). Here, the ALJ indicates that he accounted for Dr. Zarkowski and Mr. Sibrava’s
4 findings regarding concentration, focus and attendance in the RFC. Tr. 29. However, while the
5 RFC does appear to address the limitations on concentration and focus by restricting Mr. Steinke
6 to simple to moderately-complex tasks, the RFC does not include any limitation with respect to
7 attendance. Tr. 26. The Commissioner acknowledges that the RFC “did not specifically
8 incorporate this limitation [on attendance],” but argues that by limiting Mr. Steinke to “only
9 occasional public interaction” the RFC addressed “the cause of the symptoms: his social
10 anxiety.” Dkt. 10 at 5. However, this is not the explanation the ALJ offers in his opinion and,
11 thus, the Commissioner’s argument constitutes an improper *post hoc* rationalization which the
12 Court cannot rely upon to affirm the ALJ’s decision. *See Bray v. Comm’r. of Soc. Sec. Admin.*,
13 554 F.3d 1219, 1225 (“Long-standing principles of administrative law require us to review the
14 ALJ’s decision based on the reasoning and factual findings offered by the ALJ - not *post hoc*
15 rationalizations that attempt to intuit what the adjudicator may have been thinking.”). Moreover,
16 Dr. Zarkowski and Mr. Sibrava did not identify social anxiety as the specific cause of Mr.
17 Steinke’s attendance problem. Tr. 390-91. Rather, their opinion appears to attribute his
18 attendance problem to both his anxiety and depression and related symptoms of fatigue,
19 hypersomnia, anhedonia and appetite disruption. *Id.*

20 Accordingly, the ALJ erred in failing to address Dr. Zarkowski and Mr. Sibrava’s opinion
21 with respect to Mr. Steinke’s attendance. This error was harmful as the ALJ failed to incorporate
22 any attendance-related limitation into the RFC and the vocational expert testified that an added
23 restriction of missing work two days or more per month, arriving late three days or more per

1 month and being off task 20 percent or more of the time when at work would preclude
2 employment. Tr. 26, 71; *see Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (court may
3 only reverse for harmful error, and error is harmful where it is of consequence to the ultimate
4 nondisability determination). Thus, on remand, the ALJ should reevaluate Dr. Zarkowski and
5 Mr. Sibrava's opinion with respect to Mr. Steinke's attendance.

6 **B. Victoria McDuffee, Ph.D.**

7 In March 2012, Dr. McDuffee evaluated Mr. Steinke and found he was "intelligent" and
8 "capable of learning and engaging in job training" and would "likely succeed if he were to
9 identify a type of employment with minimal social demands and possibly accommodations." Tr.
10 346. She opined that he had "marked challenges in adapting to changes in work routines,
11 making simple work related decisions, being aware of hazards" and that he had marked
12 impairments in his "communication and social skills necessary to work effectively with the
13 public" as well as in "planning and goal setting." *Id.* She further opined that he had "marked
14 impairment in being punctual [and] ...may experience moderate delays in performing tasks per a
15 timed schedule ..." *Id.*

16 The ALJ gave "some weight" to Dr. McDuffee's evaluation. Tr. 29. Specifically the
17 ALJ found that,

18 Her conclusion that the claimant is unable to work without
19 accommodations is inconsistent with his demonstrated abilities. In
20 addition, her conclusions are not supported by her examination findings,
21 including a perfect mental status examination score and the conclusion
22 that he has above average intelligence. Dr. McDuffee's conclusion that
23 he has marked difficulties being punctual and interacting with co-
workers appears primarily based on his subjective reports, rather than her
observations. Furthermore, Dr. McDuffee's opinions are based on only a
single evaluation rather than a review of the entire medical record.

Tr. 29. An ALJ may reject an opinion that is brief, conclusory, and inadequately supported by

1 clinical findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). An ALJ may also
2 reject an opinion “if it is based ‘to a large extent’ on a claimant’s self reports that have been
3 properly discounted as incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).
4 The ALJ found Mr. Steinke less than fully credible, and he does not challenge that finding here.
5 Tr. 26. Nevertheless, Mr. Steinke contends the ALJ erroneously rejected Dr. McDuffee’s
6 opinion that he had a marked impairment in being punctual because her opinion was consistent
7 with that of other treatment providers and the lay witness testimony. Dkt. 9 at 7.

8 Mr. Steinke fails to establish the ALJ’s reading of the record was unreasonable. *See*
9 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (when the evidence reasonably supports
10 either confirming or reversing the ALJ’s decision, the court may not substitute its judgment for
11 that of the ALJ). Mr. Steinke does not dispute that he received a perfect score on the mental
12 status exam (MSE) performed by Dr. McDuffee and, thus, the objective portion of the exam
13 cannot be construed to support the opinion that he had marked difficulties in being punctual. *See*
14 Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination* 3 (Oxford
15 University Press 1993) (“Like the physical examination, the Mental Status Examination is
16 termed the *objective* portion of the patient evaluation.”) (emphasis in original). Moreover, a
17 review of the report supports the ALJ’s conclusion that Dr. McDuffee’s opinion is based largely
18 on Mr. Steinke’s self reports, such as, that when invited for holidays “I show up two to six hours
19 late” and “[w]hen it’s time for me to leave...when I should be there, I start to get ready.” Tr.
20 343-44. Mr. Steinke’s argument that other opinions in the record also indicate he has problems
21 with punctuality does not render the ALJ’s rejection of Dr. McDuffee’s opinion as based on self
22 reports unreasonable. There is no indication that Dr. McDuffee reviewed those “other” reports
23 or relied on something other than Mr. Steinke’s own statements to support her opinion regarding

1 punctuality. Accordingly, substantial evidence supports the ALJ's rejection of Dr. McDuffee's
2 opinion as based on Mr. Steinke's self reports.

3 **C. Lay Witnesses**

4 Ms. Montgomery also contends the ALJ erred in rejecting the lay witness statements of
5 Mr. Steinke's mother, Elena Steinke, and his girlfriend, Elizabeth Tyson, with respect to his
6 attendance and punctuality. Dkt. 9 at 6. The Court disagrees.

7 ***1. Elena Steinke***

8 Ms. Steinke submitted a letter in March 2013 stating that Mr. Steinke has a long history
9 of mental illness, has not been able to hold a job and has struggled with academic and everyday
10 functioning. Tr. 273-74. She also stated that Mr. Steinke used to go to family gatherings "but
11 now comes very late or not at all." *Id.* The ALJ gave limited weight to Ms. Steinke's statements
12 because her observations "are not consistent with other reports in the record" and the "claimant's
13 actual functioning is at a higher level than she alleges." Tr. 30. The ALJ specifically noted that
14 Mr. Steinke has successfully taken online college classes and has shown the ability to
15 concentrate and socialize as necessary. *Id.*

16 "An ALJ need only give germane reasons for discounting the testimony of lay
17 witnesses." *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). An ALJ may reject lay
18 witness evidence if other evidence in the record regarding the claimant's activities is inconsistent
19 therewith. *See Carmickle v. Comm'r., Soc. Sec. Admin.*, 533 F.3d 1155 (9th Cir. 2008) (ALJ's
20 rejection of lay witness evidence as inconsistent with claimant's completion of continuous full-
21 time coursework constituted reason germane to lay witness). Moreover, where the ALJ provides
22 clear and convincing reasons for rejecting a claimant's subjective complaints, the same reasons
23 may be considered germane for rejecting similar testimony from lay witnesses. *See Valentine v.*

1 *Comm'r. Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

2 Here, the ALJ reasonably discounted Ms. Steinke's testimony as inconsistent with other
3 reports in the record and his demonstrated ability to take online classes. The record demonstrates
4 that Mr. Steinke was receiving mostly As and Bs in his online classes and, as the ALJ notes
5 elsewhere in the opinion, his treatment records attributed the variance in his academic
6 performance to whether he liked his professors or subjects rather than to his symptoms. Tr. 28,
7 477; *see Lewis v. Astrue*, 236 F.3d 512 (9th Cir. 2001) (upholding ALJ's decision to discount lay
8 witness testimony where "the ALJ at least noted arguably germane reasons for dismissing the
9 [lay witness] testimony, even if he does not clearly link his determination to those reasons."); *see*
10 *Molina*, 674 F.3d at 1113 ("Even where activities suggest some difficulty functioning, they may
11 be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a
12 totally debilitating impairment.").

13 **2. Elizabeth Tyson**

14 The ALJ also reasonably rejected Ms. Tyson's testimony as inconsistent with the record
15 of Mr. Steinke's activities and the objective evidence, including his ability to attend college full-
16 time. Tr. 30. Ms. Tyson indicated that when Mr. Steinke returned to the University of
17 Washington he "did horribly" but the ALJ notes that the record demonstrates he had only one
18 quarter with a GPA under 2.00 and multiple quarters with a GPA above 3.00 while taking upper
19 level courses. Tr. 30. Moreover, Ms. Tyson's attribution of Mr. Steinke's at times poor
20 academic performance to his symptoms is contradicted by treatment records, as noted by the
21 ALJ, indicating that his academic performance varied based on whether he liked his professors
22 or the subjects. Tr. 28.

23 Mr. Steinke does not challenge the ALJ's finding that aspects of Ms. Steinke's and Ms.

1 Tyson's testimony are inconsistent with the record of his activities and other reports in the
2 record. Rather, he argues that the ALJ did not give a germane reason for rejecting the lay
3 witness' specific testimony concerning his attendance and punctuality. Dkt. 9 at 6. However,
4 the ALJ is required to provide reasons for rejecting lay testimony that are germane to *each*
5 *witness*, not to each part of the witness' testimony. *See Valentine*, 574 F.3d at 694 (when
6 discounting lay witness testimony, the ALJ must give "reasons that are germane to each
7 witness."). Here, the ALJ offered reasons that were germane to the testimony of Ms. Steinke and
8 Ms. Tyson. Finally, even if the ALJ had failed to provide germane reasons for rejecting the lay
9 witness testimony, any error was harmless. Ms. Steinke's and Ms. Tyson's observations are
10 substantially similar to Mr. Steinke's subjective complaints concerning his mental health
11 symptoms and limitations, including his problems with attendance and punctuality. Tr. 26, 55.
12 Mr. Steinke has not challenged the ALJ's determination that he is not fully credible and many of
13 the ALJ's reasons for rejecting that testimony (inconsistent with medical opinion evidence,
14 inconsistent with daily activities, ability to work and carry a full course load of college classes,
15 significant gaps in treatment, improvement with treatment) apply with equal force to Ms. Steinke
16 and Ms. Tyson's testimony. *See Valentine*, 574 F.3d at 694 +(because "the ALJ provided clear
17 and convincing reasons for rejecting [the claimant's] own subjective complaints, and because
18 [the lay witness's] testimony was similar to such complaints, it follows that the ALJ also gave
19 germane reasons for rejecting [the lay witness's testimony]"; *Molina*, 674 F.3d at 1115 (error in
20 failing to address lay testimony found harmless where ALJ "gave reasons for rejecting [the
21 claimant's] testimony regarding her symptoms that were equally relevant to the similar testimony
22 of the lay witnesses, and that would support a finding that the lay testimony was similarly not
23 credible.").

1 Accordingly, the ALJ did not err in rejecting the lay witness statements of Ms. Steinke
2 and Ms. Tyson.

3 **D. Remand for Further Proceedings**

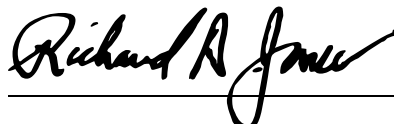
4 Mr. Steinke contends that this matter should be remanded for further administrative
5 proceedings. Dkt. 7 at 1. Remand for further proceedings is appropriate here as not all essential
6 factual issues have been resolved and there is potentially conflicting evidence which must be
7 reweighed and resolved by the ALJ. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d
8 1090, 1101 (9th Cir. 2014) (remand for additional proceedings, rather than an award of benefits,
9 is appropriate “[w]here there is conflicting evidence, and not all essential factual issues have
10 been resolved ...”).

11 **CONCLUSION**

12 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
13 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
14 405(g).

15 On remand, the ALJ should reevaluate Dr. Zarkowski and Mr. Sibrava’s opinion with
16 respect to Mr. Steinke’s attendance, reassess the RFC and reevaluate step five as necessary.

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18 DATED this 31st day of May, 2016.

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22 The Honorable Richard A. Jones
23 United States District Judge