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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 STEVEN JESSEN,¹

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Acting
10 Commissioner of Social Security,²

11 Defendant.

Case No. 2:16-cv-01359-RBL

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

12 THIS MATTER is before the Court on Plaintiff Jessen's Complaint [Dkt. 3] for review of
13 the Social Security Commissioner's denial of his application for supplemental security income.

14 Jessen suffers from carpal tunnel syndrome, asthma, personality disorder, affective
15 disorder, right knee degenerative joint disease, mild aortic regurgitation, and polysubstance
16 abuse. *See* Dkt. 10, Administrative Record 12. He applied for SSI in June 2013, alleging he
17 became disabled beginning in January 2009. *See* AR 9. That application was denied upon initial
18 administrative review and on reconsideration. *See id.* A hearing was held before Administrative
19 Law Judge Mary Gallagher Dilley in October 2014. *See id.* Jessen, unrepresented by counsel,
20 appeared and testified, as did a vocational expert. *See* AR 27-62.
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25 ¹ Steven Jessen is also known as Brad Rogers, and that name appears throughout much of the administrative record.

26 ² Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as Defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties should reflect this change.

ORDER - 1

1 The ALJ determined Jessen to be not disabled. *See* AR 9-20. The Appeals Council denied
2 Jessen’s request for review, making the ALJ’s decision the final decision of the Commissioner of
3 Social Security. *See* AR 1-4; 20 C.F.R. § 416.1481. In August 2016, Jessen filed a complaint in
4 this Court seeking judicial review of the Commissioner’s final decision. *See* Dkt. 3.

5 Jessen argues that the Commissioner’s decision to deny benefits should be reversed and
6 remanded for further administrative proceedings because the ALJ erred: (1) in evaluating the
7 medical evidence and (2) in evaluating Jessen’s testimony.

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9 The Commissioner argues the ALJ did not err in evaluating the medical evidence or
10 Jessen’s testimony, so the ALJ’s RFC and step-five finding that Jessen could perform work
11 available in the national economy were supported by substantial evidence and should be
12 affirmed.

13 **DISCUSSION**

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15 The Commissioner’s determination that a claimant is not disabled must be upheld by the
16 Court if the Commissioner applied the “proper legal standards” and if “substantial evidence in
17 the record as a whole supports” that determination. *See Hoffman v. Heckler*, 785 F.2d 1423, 1425
18 (9th Cir. 1986); *see also Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.
19 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by
20 substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied
21 in weighing the evidence and making the decision.”) (citing *Brawner v. Sec’y of Health and*
22 *Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

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24 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
25 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation
26 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if

1 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
2 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
3 by more than a scintilla of evidence, although less than a preponderance of the evidence is
4 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
5 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
6 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
7 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
8 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).³

10 I. The Medical Evidence in the Record

11 The ALJ determines credibility and resolves ambiguities and conflicts in the medical
12 evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence
13 in the record is not conclusive, “questions of credibility and resolution of conflicts” are solely the
14 functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, “the
15 ALJ’s conclusion must be upheld.” *Morgan v. Comm’r, Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th
16 Cir. 1999). Determining whether inconsistencies in the medical evidence “are material (or are in
17 fact inconsistencies at all) and whether certain factors are relevant to discount” the opinions of
18 medical experts “falls within this responsibility.” *Id.* at 603.

22 ³ As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
25 substantial evidence, the courts are required to accept them. It is the function of the
26 [Commissioner], and not the courts to resolve conflicts in the evidence. While the court may
not try the case de novo, neither may it abdicate its traditional function of review. It must
scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
rational. If they are . . . they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

1 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
2 "must be supported by specific, cogent reasons." *Reddick*, 157 F.3d at 725. The ALJ can do this
3 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
4 stating his interpretation thereof, and making findings." *Id.* The ALJ also may draw inferences
5 "logically flowing from the evidence." *Sample*, 694 F.2d at 642. Further, the Court may draw
6 "specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d
7 747, 755 (9th Cir. 1989). A physician's opinion "can only be rejected for specific and legitimate
8 reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81 F.3d 821,
9 830-31 (9th Cir. 1996).

11 Jessen argues the ALJ erred by failing to give specific and legitimate reasons supported
12 by substantial evidence to discount the opinions of examining psychologist Rodger I. Mainz,
13 Ph.D. *See* Dkt. 13 at 6-12. The Court agrees.

15 Mainz first examined Jessen in January 2013 and opined Jessen had marked limitations in
16 his ability to perform activities within a schedule, maintain regular attendance, be punctual
17 within customary tolerances without special supervision, perform routine tasks without special
18 supervision, communicate and perform effectively in a work setting, complete a normal workday
19 and workweek without interruptions from psychologically-based symptoms, and maintain
20 appropriate behavior in a work setting. *See* AR 276. In assessing Jessen's RFC in the absence of
21 substance abuse, the ALJ gave Mainz's opinion little weight because Mainz did not provide "any
22 basis or support" for the limitations, and because Mainz based his opinion on Jessen's subjective
23 reports without any review of treatment records. *See* AR 17. Neither reason is supported by
24 substantial evidence.
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1 An ALJ need not accept a physician’s opinion “if that opinion is brief, conclusory, and
2 inadequately supported by clinical findings.” *See Batson*, 359 F.3d at 1195; *see also Thomas v.*
3 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
4 Cir. 2001). However, Mainz provided support for his opinion throughout the examination report.
5 *See AR 274-78.* In the “Clinical Findings” section, Mainz listed mood instability and depression,
6 noting Jessen was “very intense, emotionally disconnected, and odd in his emotional reactions”
7 and that such behavior in the workplace would be “relationship alienating” and would impede his
8 ability to be adequately productive. *See AR 275.* Mainz also performed a mental status
9 examination, in which he observed Jessen to have pressured speech, unstable and hypomanic
10 mood, bizarrely dramatic attitude and behavior, and an affect that was over-reactive, dramatic,
11 and obtrusively odd. *See AR 277.* Mainz noted Jessen failed tests measuring concentration. *See*
12 *AR 278.* He concluded Jessen’s behavior was “likely an ingrained aspect of his personality
13 functioning and not likely amenable to change,” even with continued abstinence and mental
14 health treatment. *See AR 277.* Therefore, the ALJ’s finding that Mainz did not provide any basis
15 or support for his opinion is not supported by substantial evidence.

18 According to the Ninth Circuit, an ALJ may also reject a physician’s opinion “if it is
19 based ‘to a large extent’ on a claimant’s self-reports that have been properly discounted as
20 incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan*, 169
21 F.3d at 602). However, this situation is distinguishable from one in which the doctor provides his
22 own observations in support of his assessments and opinions. *See Ryan v. Comm’r, Soc. Sec.*
23 *Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008). Here, as described above, Mainz reported
24 many clinical observations and performed objective testing in the form of an MSE. *See AR*
25 *274-78.* Furthermore, “[m]ental health professionals frequently rely on the combination of their
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1 observations and the patient's reports of symptoms," so "[t]o allow an ALJ to discredit a mental
2 health professional's opinion solely because it is based to a significant degree on a patient's
3 'subjective allegations' is to allow an end-run around our rules for evaluating medical opinions
4 for the entire category of psychological disorders." *Ferrando v. Comm'r, Soc. Sec. Admin.*, 449
5 Fed. Appx. 610 n.2 (9th Cir. 2011) (unpublished memorandum opinion). While the ALJ noted
6 Mainz did not have any treatment records to review, that alone is not substantial evidence to find
7 Mainz "thus based his opinion" on Jessen's self-reports at the evaluation, disregarding Mainz's
8 significant clinical observations. *See* AR 17. Where, as here, "an opinion is not more heavily
9 based on a patient's self-reports than on clinical observations, there is no evidentiary basis for
10 rejecting the opinion." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (citing *Ryan*, 528
11 F.3d at 1199-1200). Therefore, the ALJ erred by failing to provide a specific and legitimate
12 reason supported by substantial evidence for discounting Mainz's 2013 opinion.
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15 Mainz again examined Jessen in September 2014, and opined that Jessen had marked
16 limitations in his ability to retain what he was told and to express himself coherently and that he
17 was unable to perform work involving customers or clients or to respond appropriately to
18 supervisory direction or correction. *See* AR 408. In assessing Jessen's RFC in the absence of
19 substance abuse, the ALJ discounted this opinion because Mainz appeared to rely substantially
20 on Jessen's self-reports and because Mainz's observations were inconsistent with Jessen's
21 presentation and functioning when he was not under the influence. *See* AR 17-18. Neither of
22 these reasons is supported by substantial evidence.
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24 First, the ALJ found Mainz "suggested [Jessen] could not hold a manual unskilled job
25 because of carpal tunnel syndrome" but that Mainz was unqualified to evaluate Jessen's physical
26 impairments and "thus appear[ed] to have relied substantially on [Jessen's] subjective

1 statements.” *See* AR 17. However, Mainz merely mentioned in his summary that Jessen’s
2 untreated carpal tunnel syndrome “would appear to prevent him from holding unskilled manual
3 work,” but ultimately found the results of the psychological evaluation supported his finding that
4 Jessen’s “marked disturbances in psychosocial relatedness, [] cognitive functioning, and
5 personality functioning” impair his workplace abilities. *See* AR 408. Again, Mainz recorded
6 many clinical observations and objective test results in support of his opinion. *See* AR 405-10.
7 Substantial evidence does not support the ALJ’s inference that Mainz’s opinion regarding
8 Jessen’s cognitive and social functioning was “substantially” shaped by Jessen’s self-reports
9 simply because Mainz also commented on Jessen’s physical functioning.
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11 The ALJ also found that while Jessen told Mainz at the September 2014 evaluation that
12 he had been clean and sober since May 2014, there was no objective evidence to substantiate that
13 statement, and Jessen’s behavior at the evaluation was inconsistent with his behavior when
14 sober. *See* AR 17-18. As evidence of Jessen’s “behavior when sober,” the ALJ cited one doctor’s
15 report from a visit for carpal tunnel treatment in which the doctor stated Jessen had normal
16 speech, orientation, memory, and attention. *See* AR 18 (citing AR 419). However, the record
17 contains several reports, including Mainz’s January 2013 report, in which Jessen, during periods
18 of sobriety, was reported to display behavior consistent with his behavior at Mainz’s September
19 2014 evaluation. *See, e.g.*, AR 274-78, 284-85, 361. Furthermore, the absence of “objective
20 evidence” of Jessen’s reported sobriety is not sufficient evidence to determine Jessen was not
21 sober during the evaluation, considering the ALJ cited no objective evidence to show he was
22 using. The date Jessen reported as his last relapse is corroborated elsewhere in the record. *See*
23 AR 481. Therefore, substantial evidence does not support the ALJ’s inference that Jessen was
24 using during the September 2014 evaluation and that Mainz’s opinion of his functioning in the
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1 absence of substance abuse could be discounted for that reason. The ALJ erred in evaluating this
2 opinion as well.

3 “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674
4 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
5 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
6 *Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115.
7 The determination as to whether an error is harmless requires a “case-specific application of
8 judgment” by the reviewing court, based on an examination of the record made “‘without regard
9 to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118-19
10 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).
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12 Had the ALJ fully credited Meinz’s opinions, the RFC would have included additional
13 limitations, as would the hypothetical questions posed to the vocational expert. Because the ALJ
14 based her determination that Jessen could perform work available in the national economy on
15 that incomplete RFC, the ALJ’s error affected the ultimate disability determination, and is
16 therefore not harmless.
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18 **II. Jessen’s Testimony**

19 Jessen argues the ALJ erred by failing to give a clear and convincing reason supported by
20 substantial evidence to discount Jessen’s testimony. *See* Dkt. 13 at 12-17. The Court agrees.
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22 Questions of credibility are solely within the responsibility of the ALJ. *See Sample*, 694
23 F.2d at 642. The Court may not reverse a credibility determination where it is based on
24 contradictory or ambiguous evidence. *See id.* at 579. Still, to reject a claimant’s subjective
25 complaints, the ALJ must provide “specific, cogent reasons for the disbelief.” *Lester*, 81 F.3d at
26 834 (citation omitted). The ALJ “must identify what testimony is not credible and what evidence

1 undermines the claimant's complaints." *Id.*; *see also* *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th
2 Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons for
3 rejecting the claimant's testimony must be "clear and convincing" and supported by substantial
4 evidence. *Lester*, 81 F.2d at 834.

5 Here, the ALJ found Jessen's testimony regarding his functioning in the absence of
6 substance abuse not to be fully credible because Jessen's testimony was inconsistent with his
7 daily activities and with the objective medical evidence. *See* AR 16. An ALJ may discount a
8 claimant's testimony when a claimant's activities of daily living "contradict his other testimony."
9 *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The claimant, however, need not be
10 "utterly incapacitated" to be eligible for disability benefits, and "many home activities may not
11 be easily transferable to a work environment." *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th
12 Cir. 1996). In addition, the Ninth Circuit has "recognized that disability claimants should not be
13 penalized for attempting to lead normal lives in the face of their limitations." *Reddick*, 157 F.3d
14 at 722.
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17 The ALJ found Jessen's complaints to be inconsistent with his ability to perform
18 household duties, engage in social activities, and perform landscaping jobs. *See* AR 16.
19 However, the ALJ does not explain how Jessen's ability to make frozen meals or to travel to AA
20 meetings contradicted Jessen's testimony that he would have difficulty with memory, energy,
21 and use of his right hand for extended periods of time on a consistent basis at work. *See* AR 16,
22 52-53, 170. Notably, the ALJ referred to Jessen's ability to perform landscaping jobs, but the
23 emergency department report to which the ALJ cited stated Jessen had sustained multiple
24 injuries from performing that job that had left him with pain and swelling days later. *See* AR
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1 317. Substantial evidence does not support the ALJ’s finding that Jessen’s activities of daily
2 living contradicted his testimony about his workplace functioning.

3 The ALJ’s remaining reason for discounting Jessen’s testimony was that it was
4 inconsistent with the objective medical evidence in the record, including physical and psychiatric
5 examination findings. *See* AR 16. However, a claimant’s testimony may not be rejected solely
6 because the degree of symptoms alleged is not supported by objective medical evidence. *See*
7 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *see also* *Byrnes v. Shalala*, 60 F.3d 639,
8 641-42 (9th Cir. 1995); *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995); *Bunnell v.*
9 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991) (*en banc*). This is because to allow otherwise
10 “‘would render meaningless’ the requirement that” the ALJ “consider all relevant evidence,” not
11 just that which is medical. *Bunnell*, 947 at 347 (citation omitted).

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13 Therefore, the ALJ erred by failing to provide a clear and convincing reason supported by
14 substantial evidence to discount Jessen’s testimony.

16 **III. Scope of Remand**

17 Because the ALJ erred in evaluating the medical evidence and Jessen’s testimony, the
18 RFC assessed by the ALJ does not necessarily completely and accurately describe all of Jessen’s
19 capabilities, so the RFC and resulting step-five finding are not supported by substantial evidence
20 and are in error. Generally, when the Court reverses an ALJ’s decision due to harmful error, “the
21 proper course, except in rare circumstances, is to remand to the agency for additional
22 investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
23 omitted). Jessen requests that the matter be remanded for further administrative proceedings. *See*
24 Dkt. 13 at 17. Accordingly, the Court remands this case to cure the errors described above and to
25 address any remaining conflicts in the evidence about Jessen’s functional capabilities and his
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1 ability to perform other jobs existing in significant numbers in the national economy despite any
2 additional limitations.

3 **CONCLUSION**

4 The Court finds the ALJ improperly concluded Jessen is not disabled. Defendant's
5 decision to deny benefits is REVERSED, and this matter is REMANDED for further
6 administrative proceedings as detailed in this Order.
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8 DATED this 8th day of March, 2017.
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13 Ronald B. Leighton
14 United States District Judge
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