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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PHAYSONE S VORAVONG,  
Plaintiff,

v.

NANCY A BERRYHILL, Acting  
Commissioner of Social Security,  
Defendant.

CASE NO. 2:17-CV-00015-DWC

ORDER AFFIRMING DEFENDANT’S  
DECISION TO DENY BENEFITS

Plaintiff Phaysone S. Voravong, proceeding *pro se*, filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant’s denial of his application for supplemental security income (“SSI”). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 7.

After considering the record, the Court concludes the Administrative Law Judge (“ALJ”) properly analyzed the medical opinion evidence and Plaintiff’s credibility. The Court also concludes remand under sentence six is not warranted in this case. As the ALJ’s decision

1 finding Plaintiff not disabled is supported by substantial evidence, the Commissioner's  
2 decision is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

### 3 FACTUAL AND PROCEDURAL HISTORY

4 On September 20, 2013, Plaintiff filed an application for SSI, alleging disability as of  
5 December 11, 2012. *See* Dkt. 9, Administrative Record ("AR") 15. The application was denied  
6 upon initial administrative review and on reconsideration. *See* AR 15. A hearing was held before  
7 ALJ Timothy Mangrum on January 13, 2015. *See* AR 35-59. In a decision dated June 30, 2015,  
8 the ALJ determined Plaintiff to be not disabled. AR 15-30. Plaintiff's request for review of the  
9 ALJ's decision was denied by the Appeals Council, making the ALJ's decision the final decision  
10 of the Commissioner. *See* AR 1-5, 20 C.F.R. § 404.981, § 416.1481.

11 In the Opening Brief, it appears Plaintiff is arguing: (1) he disagrees with the medical  
12 opinion evidence and the ALJ's decision; and (2) the ALJ failed to provide specific, clear, and  
13 convincing reasons for finding Plaintiff's subjective testimony not entirely credible. Dkt. 11.  
14 Plaintiff also attaches a new medical opinion to his Opening Brief, which he requests the Court  
15 consider. *Id.*<sup>1</sup>

### 16 STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
18 social security benefits if the ALJ's findings are based on legal error or not supported by  
19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
20 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

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23 <sup>1</sup> Defendant asserts Plaintiff raised the following grounds: (1) Whether the ALJ reasonably concluded  
24 Plaintiff's impairments did not meet or equal a Listing; (2) Whether the ALJ reasonably assessed the credibility of  
Platiniff's symptom allegations; and (3) Whether the ALJ reasonably weighed the medical opinions. Dkt. 12. The  
Court recognizes it is difficult to discern the alleged errors raised in Plaintiff's Opening Brief. However, the Court  
finds the assignments of error are as listed in the body of this Order.



1 result. Accordingly, the Court finds Plaintiff has not shown the ALJ erred in how the ALJ  
2 considered the evidence.

3 **II. Whether the ALJ provided sufficient reasons for discrediting Plaintiff's**  
4 **testimony.**

5 Plaintiff also contends the ALJ erred in his consideration of Plaintiff's subjective  
6 symptom testimony. Dkt. 11. To reject a claimant's subjective complaints, the ALJ must provide  
7 "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)  
8 (citation omitted). The ALJ "must identify what testimony is not credible and what evidence  
9 undermines the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).  
10 Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting  
11 the claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834. Questions of  
12 credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th  
13 Cir. 1982). The Court should not "second-guess" this credibility determination. *Allen v. Heckler*,  
14 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a credibility  
15 determination where that determination is based on contradictory or ambiguous evidence. *Id.* at  
16 579.

17 Plaintiff alleges he is disabled due to his diabetes, neuropathy, and depression. *See* AR  
18 17. Plaintiff testified his neuropathy causes headaches and sharp, throbbing, burning pain in his  
19 feet and calves. AR 41. He states he can barely walk, and cannot stand or lift anything. AR 47.  
20 He gets relief from narcotic pain medication, but the pain medication causes dizziness and  
21 drowsiness. AR 42. Plaintiff states is unable to relate to people or sleep due to his depression and  
22 he just wants to be alone all the time. AR 44. He also reported insomnia and difficulty focusing.  
23 AR 44, 49. Plaintiff goes out with friends once or twice per month and spends most of his time at  
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1 home laying down. AR 47-49. During the day, Plaintiff spends his time on Facebook and  
2 Instagram and watches television. AR 49.

3 After outlining the medical evidence contained in the record, the ALJ found Plaintiff's  
4 impairments could be expected to cause some of his alleged symptoms. AR 19-24. However, the  
5 ALJ determined Plaintiff's "statements concerning the intensity, persistence and limiting effects  
6 of these symptoms are not entirely credible" because the record shows Plaintiff: (1) performed  
7 daily activities which were quite involved; (2) failed to comply with conservative, routine  
8 treatment; (3) exhibited drug seeking behavior; (4) was not motivated to work; (5) made  
9 inconsistent statements regarding his conditions; and (6) engaged in symptom exaggeration. AR  
10 24-26.<sup>2</sup>

11 First, the ALJ found Plaintiff's daily activities were inconsistent with Plaintiff's  
12 allegations of disabling impairments. AR 24. The Ninth Circuit has recognized two grounds for  
13 using daily activities to form the basis of an adverse credibility determination: (1) whether the  
14 activities contradict the claimant's other testimony and (2) whether the activities of daily living  
15 meet "the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.  
16 2007).

17 During the hearing, Plaintiff testified he cannot sit, stand, or lift anything, he can barely  
18 walk, and has difficulty concentrating. AR 24, 47-49. He stated he spends time with friends once  
19 or twice per month, but mostly stays home alone. AR 47-49. In contrast to Plaintiff's testimony,  
20 the ALJ found the record shows: Plaintiff has the ability to handle personal care with no

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22 <sup>2</sup> The Court notes, on March 16, 2016, the Social Security Administration changed the way it analyzes a  
23 claimant's credibility. *See* SSR 16-3p, 2016 WL 1119029 (S.S.A. Mar. 16, 2016). The term "credibility" is no  
24 longer used. *Id.* Further, symptom evaluation is no longer an examination of a claimant's character; "adjudicators  
will not assess an individual's overall character or truthfulness." *Id.* Here, the ALJ's decision, dated June 30, 2015,  
was issued approximately nine months before SSR 16-3p became effective. As SSR 16-3p did not become effective  
until after the ALJ issued his decision, the Court will not consider whether the ALJ's decision is consistent with SSR  
16-3p.

1 | problems, prepare meals, do laundry, iron, go outside on a weekly basis, drive, shop in stores,  
2 | spend time with others, get along with others, pay bills, finish tasks, and follow instructions. AR  
3 | 24, 225-30, 372. The ALJ also noted Plaintiff was able to sit at appointments and stood for a  
4 | more recent appointment. AR 24. Additionally, the record shows, in June of 2013, Plaintiff was  
5 | exercising more (walking and occasionally biking) and making friends and socializing regularly.  
6 | AR 299. After review of the ALJ's decision and the record, the Court finds substantial evidence  
7 | supports the ALJ finding Plaintiff's activities of daily living are inconsistent with the alleged  
8 | severity of his symptoms.

9 |         Second, the ALJ concluded Plaintiff's subjective symptom testimony was not entirely  
10 | credible because the record shows Plaintiff received only conservative, routine treatment, with  
11 | which he failed to comply. AR 24. An ALJ may properly rely on evidence which shows "an  
12 | unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of  
13 | treatment" to discount a plaintiff's statements. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989);  
14 | *see* SSR 96-7p 1996 SSR LEXIS 4, \*21-22 ("the individual's statements may be less credible if  
15 | the level or frequency of treatment is inconsistent with the level of complaints. . . . and there are  
16 | no good reasons for this failure"). Further, "if a claimant complains about disabling pain but  
17 | fails to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may use  
18 | such failure as a basis for finding the complaint unjustified or exaggerated." *Orn*, 495 F.3d at  
19 | 638.

20 |         Here, the record shows Plaintiff was instructed to increase his activity during the day and  
21 | stretch for his calf pain. *See* AR 19-20, 339. He was referred to physical therapy. *See* AR 334,  
22 | 348-49. Plaintiff was eventually prescribed a low-dose opiate for pain management. AR 306. He  
23 | was also placed on insulin, to be taken at bedtime, for his diabetes. AR 338. The ALJ found the  
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1 record showed the only treatment Plaintiff complied with was taking narcotic pain medication.  
2 AR 24. The record shows Plaintiff was not compliant with his diabetes management and, at  
3 times, stopped checking his blood sugar levels. AR 19-20, 329, 333, 338. Treatment notes show  
4 he was hesitant to go through with the task of tighter glucose control. AR 339. Plaintiff was seen  
5 for a physical therapy initial care plan. AR 20, 349. Plaintiff's treatment plan included weekly  
6 physical therapy until his plan of care was reviewed. AR 351. Plaintiff, however, did not return  
7 to physical therapy after the initial visit. AR 246-47.

8 After reviewing the record, the Court finds there is substantial evidence supporting the  
9 ALJ's decision to discount Plaintiff's testimony because Plaintiff was prescribed only  
10 conservative treatment of diabetes management and physical therapy, with which he failed to  
11 comply. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (upholding ALJ discounting  
12 claimant's credibility in part due to lack of consistent treatment, and noting the fact claimant's  
13 pain was not sufficiently severe to motivate her to seek treatment, even if she had sought some  
14 treatment, was powerful evidence regarding extent to which she was in pain).

15 Third, Plaintiff's testimony was given less weight because the record showed Plaintiff  
16 engaged in drug-seeking behavior. AR 24. The Ninth Circuit has held an ALJ may, under certain  
17 circumstances, discount a claimant's subjective symptom testimony due to drug-seeking  
18 behavior. *See Edlund v. Massanari*, 253 F.3d 1152, 1157-58 (9th Cir. 2001). Here, the ALJ  
19 identified evidence showing Plaintiff has drug-seeking behaviors. AR 20-24. For example, the  
20 record shows Plaintiff reported using oxycodone which belonged to family members and friends  
21 and pressured his doctor to prescribe narcotic pain medication. AR 20-21, 300, 305, 311.  
22 Plaintiff's treating physician, Dr. David Wenger, M.D., eventually agreed to prescribe a low-  
23 dose opiate, but instructed Plaintiff to take the medication only as prescribed and to stop using  
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1 his friends' narcotic medications. AR 306. Plaintiff reported his pain did not improve enough, so  
2 he took more than prescribed. AR 371. As there is evidence Plaintiff pressured his doctor for  
3 narcotic pain medication and improperly used pain medication, the ALJ rationally concluded the  
4 evidence showing Plaintiff engaged in drug-seeking behavior discounted his subjective symptom  
5 testimony.

6 Fourth, the ALJ found Plaintiff's statements were not entirely credible because the  
7 evidence failed to show Plaintiff was motivated to work consistently. AR 24-25. Evidence of a  
8 poor work history suggesting a claimant is not motivated to work can be a proper reason to  
9 discredit a claimant's testimony that he is unable to work. *Thomas v. Barnhart*, 278 F.3d 947, 959  
10 (9th Cir. 2002); *Tommasetti*, 533 F.3d at 1040 (finding lack of motivation to work is a sufficient  
11 reason to discount a plaintiff's testimony); *see also Franz v. Colvin*, 91 F. Supp. 3d 1200, 1209-10  
12 (D. Or. 2015) (holding the same). Here, the record shows Plaintiff engaged in substantial gainful  
13 activity in only two of the fifteen years prior to his alleged onset date. *See* AR 175;  
14 [www.ssa.gov/oact/cola/sga.html](http://www.ssa.gov/oact/cola/sga.html) (accessed June 12, 2017). In fact, Plaintiff had no income during  
15 seven of the fifteen years prior to his alleged onset date. *See* AR 175. The ALJ found this evidence  
16 showed factors other than Plaintiff's alleged impairments affected his ability to maintain fulltime  
17 employment. AR 25. As an ALJ may properly consider lack of motivation to work in assessing a  
18 claimant's credibility and as Plaintiff did not engage in substantial gainful activity for several years  
19 prior to his alleged disability onset date, the ALJ did not err in considering Plaintiff's lack of  
20 motivation to work when finding Plaintiff's testimony was not entirely credible.

21 Fifth, the ALJ determined Plaintiff's subjective symptom testimony was not entirely  
22 credible because he made inconsistent statements regarding his impairments. AR 25. An ALJ  
23 may consider prior inconsistent statements concerning symptoms and "other testimony by  
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1 [plaintiff] that appears less than candid in weighing plaintiff's credibility." *Tommasetti v. Astrue*,  
2 533 F.3d 1035, 1039 (9th Cir. 2008). Here, the ALJ noted Plaintiff testified his pain was so  
3 severe he could not lift anything, stand, or sit and he had problems concentrating. AR 25.  
4 However, he reported to his treating providers he was exercising more, feeling more energetic,  
5 and his mental health was improving. AR 25, 299. He testified to crying every day, but there was  
6 no mention of crying in the treatment notes. AR 25. As there is evidence in the record which  
7 supports the ALJ's finding that Plaintiff's testimony was inconsistent with statements contained  
8 in the record, the ALJ's fifth reason for finding Plaintiff's testimony not entirely credible is  
9 valid.

10 Last, the ALJ discounted Plaintiff's subjective symptom testimony because there was  
11 evidence Plaintiff exaggerated his symptoms. AR 25-26. Evidence showing a plaintiff  
12 exaggerated his symptoms is a valid reason to discount a plaintiff's subjective symptom  
13 testimony. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). To support this  
14 finding, the ALJ cited to one medical opinion finding Plaintiff's subjective assessment of his  
15 mental health problems seemed exaggerated. AR 25, 372. Neither the ALJ nor Defendant cite  
16 to any other record showing Plaintiff is exaggerating his pain symptoms. As the ALJ cites to  
17 only one record showing Plaintiff's subjective mental health symptoms seem exaggerated, the  
18 Court finds this is not a clear and convincing reasons for discounting Plaintiff's subjective  
19 symptom testimony.

20 In conclusion, the Court finds the ALJ provided one invalid reasons for discounting  
21 Plaintiff's subjective symptom testimony. However, if the credibility determination is supported  
22 by substantial evidence in the record, one improper reason for discounting Plaintiff's testimony  
23 does not render the ALJ's assessment of Plaintiff's testimony invalid. *Tonapetyan*, 242 F.3d at  
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1 1148. The ALJ gave five valid reasons for finding Plaintiff was not entirely credible. As such,  
2 the Court finds the ALJ's decision regarding Plaintiff's testimony is supported by substantial  
3 evidence. Accordingly, the ALJ's analysis of Plaintiff's subjective symptom testimony is proper.

4 **III. Whether this matter should be remanded for the consideration of new evidence.**

5 Plaintiff attached a letter written by his current treating physician, Dr. Michael P.  
6 Madwed, M.D., to his Opening Brief. Dkt. 11, p. 7. Plaintiff asks the Court to consider this new  
7 evidence. *Id.* at pp. 5-6.

8 If a plaintiff desires the Court to consider "new evidence" that is not part of the record  
9 when the plaintiff files the Complaint, the Court shall apply sentence six of 42 U.S.C. § 405(g) to  
10 determine if it has jurisdiction to review the new evidence. Sentence Six of 42 U.S.C. § 405(g)  
11 authorizes a reviewing court to remand a case to the Commissioner "upon a showing that there is  
12 new evidence which is material and that there is good cause for the failure to incorporate such  
13 evidence into the record in a prior proceeding." 42 U.S.C. § 405(g); *see Melkonyan v. Sullivan*, 501  
14 U.S. 89 (1991). Notably, "[a] claimant does not meet the good cause requirement by merely  
15 obtaining a more favorable report once his or her claim has been denied. To demonstrate good  
16 cause, the claimant must demonstrate that the new evidence was unavailable earlier." *Mayes v.*  
17 *Massanari*, 276 F.3d 453, 463 (9th Cir. 2001) (citing *Key v. Heckler*, 754 F.2d 1545, 1551 (9th  
18 Cir. 1985)).

19 Plaintiff provides no explanation for why he could not obtain a more favorable medical  
20 opinion earlier. The medical opinion references objective medical testing from 2014. *See* Dkt.  
21 11, p. 7. While Plaintiff may not have been treating with Dr. Madwed at the time of the ALJ  
22 hearing, he does not explain why he could not obtain a similar opinion regarding his conditions  
23 and the objective medical evidence at the time of the administrative proceedings. It appears  
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1 Plaintiff simply obtained a more favorable report after his claim was denied, which is not  
2 sufficient to meet the “good cause” requirement. As Plaintiff has not shown good cause for his  
3 failure to incorporate the new evidence into the record during the administrative proceedings, the  
4 Court finds a sentence six remand is not appropriate. *See Key*, 754 F.2d at 1551 (finding that  
5 when plaintiff seeks a new medical opinion after being denied benefits, the new evidence does  
6 not meet the good cause standard); *Vasquez v. Colvin*, 2014 WL 65305, \*23 (D. Ariz. Jan. 8,  
7 2014) (“Merely obtaining a new report after the ALJ has ruled does not satisfy [the good cause]  
8 standard because it does not demonstrate that Plaintiff was unable to obtain the evidence in time  
9 for the hearing before the ALJ.”).

10 CONCLUSION

11 Based on the above stated reasons and the relevant record, the Court hereby finds the ALJ  
12 properly concluded Plaintiff was not disabled. Accordingly, Defendant’s decision to deny  
13 benefits is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

14 Dated this 20th day of June, 2017.

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17 David W. Christel  
18 United States Magistrate Judge  
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