

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL JOHN LESKELA, JR.,

Plaintiff,

CASE NO. C17-0328-MAT

V.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.

## ORDER RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Michael John Leskela, Jr., proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1972.<sup>1</sup> He has a high school diploma, and has worked as a painter, Salvation Army bell ringer, temporary laborer, and retail and grocery stocker. (AR 41,

<sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL  
PAGE - 1

1 343.)

2 Plaintiff applied for SSI in August 2013. (AR 297-305.) That application was denied  
3 initially and upon reconsideration, and Plaintiff timely requested a hearing. (AR 142, 155, 195-  
4 97.)

5 On July 1, 2015, ALJ M.J. Adams held a hearing, taking testimony from Plaintiff and a  
6 vocational expert. (AR 37-65.) On July 30, 2015, the ALJ issued a decision finding Plaintiff not  
7 disabled. (AR 8-18.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request  
8 for review on January 25, 2017 (AR 806-11), making the ALJ's decision the final decision of the  
9 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining  
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not  
16 engaged in substantial gainful activity since the application date. (AR 11.) At step two, it must  
17 be determined whether a claimant suffers from a severe impairment. The ALJ found severe  
18 Plaintiff's depression, anxiety, and history of alcohol abuse. (*Id.*) Step three asks whether a  
19 claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's  
20 impairments did not meet or equal the criteria of a listed impairment. (AR 11-12.)

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
22 residual functional capacity (RFC) and determine at step four whether the claimant has  
23 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of

1 performing a full range of work at all exertional levels, with the following limitations: he can  
2 perform simple, routine tasks and follow short, simple instructions. He can do work that requires  
3 little or no judgment and perform simple duties that can be learned on the job in less than 30 days.  
4 He can respond appropriately to supervision, but cannot work in close coordination with co-  
5 workers where teamwork is required. He can tolerate occasional changes in the work environment  
6 and work that requires no interaction with the public. (AR 12.) With that assessment, the ALJ  
7 found Plaintiff unable to perform past relevant work. (AR 16.)

8 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to  
9 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
10 adjustment to work that exists in significant levels in the national economy. The ALJ found  
11 Plaintiff capable of transitioning to representative occupations, such as mail clerk, hand packager,  
12 and landscape laborer. (AR 16-17.)

13 This Court's review of the ALJ's decision is limited to whether the decision is in  
14 accordance with the law and the findings supported by substantial evidence in the record as a  
15 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
16 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
17 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
18 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
19 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
20 2002).

21 Plaintiff argues the ALJ erred in (1) discounting an opinion written by examining  
22  
23

1 psychologist Melanie Mitchell, Psy.D; and (2) discounting his subjective testimony.<sup>2</sup> The  
2 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be  
3 affirmed, but that if it is remanded, it should be remanded for further proceedings rather than a  
4 finding of disability.

5 Dr. Mitchell's opinion

6 Dr. Mitchell examined Plaintiff in July 2013, and completed a form DSHS opinion. (AR  
7 529-42.) She indicated that Plaintiff had many marked limitations in a variety of functional areas.  
8 (AR 531.)

9 The ALJ gave Dr. Mitchell's opinion "some weight," finding it "generally consistent with  
10 the objective medical record and the other opinion evidence." (AR 15.) The ALJ discounted Dr.  
11 Mitchell's opinion, however, because she only reviewed one evaluation and because Plaintiff was  
12 not attending counseling at the time of the examination, and this lack of treatment may have  
13 exacerbated his symptoms. (*Id.*)

14 These reasons are not specific and legitimate, as required when an ALJ discounts a  
15 examining physician's controverted opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.  
16 1996). The ALJ found Dr. Mitchell's opinion to be generally consistent with the other opinion  
17 evidence, and therefore it is unclear why her failure to review multiple other opinions would  
18 undermine her opinion. Furthermore, the ALJ cited no evidence suggesting that Plaintiff's  
19 symptoms worsened when he failed to attend counseling. The ALJ cited an incident when  
20 Plaintiff's symptoms worsened when he failed to take his medication (AR 14), but it appears that  
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22 <sup>2</sup> Plaintiff also challenged the sufficiency of the ALJ's step-five findings, but in doing so, only  
23 reiterated arguments made in the first two assignments of error. Dkt. 18 at 14-15. Thus, this issue need not  
be addressed separately.

1 he was taking medication even during his gap in therapy. (See AR 566.) Thus, the ALJ's reasons  
2 to discount Dr. Mitchell's opinion are not specific and legitimate reasons supported by substantial  
3 evidence, and the ALJ erred in discounting Dr. Mitchell's opinion.

4 Subjective testimony

5 The ALJ discounted Plaintiff's subjective testimony because the medical record showed  
6 that he was not as impaired as alleged, and because his symptoms are exacerbated during periods  
7 of medication noncompliance. (AR 13-14.)

8 Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth  
9 Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). The Court agrees. Although  
10 the ALJ first found that Plaintiff's testimony was contradicted by the medical record, the ALJ  
11 simply summarized the medical record and did not explain why it contradicted Plaintiff's  
12 allegations. (AR 13-14.) This reasoning is insufficient. *See Brown-Hunter v. Colvin*, 806 F.3d  
13 487, 493-94 (9th Cir. 2015).

14 Furthermore, although the ALJ stated that Plaintiff's allegations of trouble socializing were  
15 not consistent with his complaints during therapy (AR 14), as noted in Plaintiff's brief, Plaintiff  
16 consistently reported problems in social functioning during therapy. *See* Dkt. 18 at 14 (citing AR  
17 697, 707, 719, 727, 747, 752, 781, 790, 796).

18 The ALJ also found that Plaintiff's symptoms flared during periods of noncompliance with  
19 medication, but the ALJ only identified one incident of actual noncompliance: Plaintiff reported  
20 an increase in symptoms during a period that he was out of medication. (AR 682, 731.) Plaintiff  
21 had apparently attempted to contact his provider to request medication, but his call had gone to  
22 voicemail and he had not been able to get through. (AR 731.) This one incidence of  
23 noncompliance is not a clear and convincing reason to discount his testimony, particularly because

1 even when Plaintiff complied, his symptoms persisted, as even the ALJ's summary of the evidence  
2 mentions. (AR 13 (stating that Plaintiff reported no improvement with Wellbutrin and Zoloft), 14  
3 (Plaintiff continued to report paranoia symptoms even after his Wellbutrin and Mirtazapine were  
4 restarted).) Plaintiff's one documented episode of noncompliance does not indicate that his  
5 symptoms are significantly alleviated with medication, and thus this evidence does not undermine  
6 Plaintiff's allegation of disability.

7       Although Plaintiff requests that the ALJ's errors in assessing Dr. Mitchell's opinion and  
8 his own subjective testimony be remedied by a remand for a finding of disability (Dkt. 18 at 15),  
9 the Court finds that this remedy would be inappropriate in light of the conflicts in the opinion  
10 evidence as to the extent of Plaintiff's limitations. Further proceedings to resolve these conflicts  
11 would not be useless, and therefore the Court will not credit as true the improperly rejected  
12 evidence. *See Leon v. Berryhill*, \_\_ F.3d \_\_, 2017 WL 5150294, at \*4 (9th Cir. Nov. 7, 2017).

## **CONCLUSION**

14 For the reasons set forth above, the ALJ's decision is REVERSED and the matter is  
15 REMANDED for further administrative proceedings.

16 DATED this 17th day of November, 2017.

Mary Alice Theiler  
Mary Alice Theiler  
United States Magistrate Judge

**ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL  
PAGE - 6**