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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 ZOWDI GENET O'RYAN,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Acting
11 Commissioner of Social Security,

12 Defendant.

Case No. C17-0689RSL

**ORDER REVERSING THE
COMMISSIONER AND
REMANDING FOR FURTHER
PROCEEDINGS**

13 Zowdie Genet O'Ryan appeals the decision of the administrative law judge ("ALJ")
14 finding her not disabled. She contends the ALJ's residual functional capacity ("RFC")
15 determination fails to account for all limitations assessed by Shelly K. Woodward, Ph.D., and
16 that the ALJ erroneously rejected Ms. O'Ryan's testimony. She also contends that the case
17 should be remanded to consider new and material evidence. Dkt. 9 at 1-2. For the reasons below,
18 the 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 **THE ALJ'S DECISION**

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

22 **Step one:** Ms. O'Ryan has not engaged in substantial gainful activity since April 4,

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¹ 20 C.F.R. §§ 404.1520, 416.920.

1 2013.

2 **Step two:** Ms. O’Ryan has the following severe impairments: major depressive disorder,
3 schizophrenia, and anxiety.

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

6 **Residual Functional Capacity:** Ms. O’Ryan can perform the full range of work at all
7 exertional levels except she can perform unskilled work with occasional interaction with
8 coworkers and supervisors but no interaction with the general public. She can adapt to
9 routine work changes.

10 **Step four:** Ms. O’Ryan has no past relevant work.

11 **Step five:** Ms. Ryan can perform jobs that exist in significant numbers in the national
12 economy and is not disabled.

13 Tr. 17-22. The ALJ’s decision is the Commissioner’s final decision because the Appeals Council
14 denied review. Tr.1.³

15 DISCUSSION

16 A. Dr. Woodward’s Opinions

17 Ms. O’Ryan contends the ALJ’s RFC determination erroneously fails to account for all
18 limitations assessed by Shelly K. Woodward, Ph.D. In Dr. Woodward’s opinion, Ms. O’Ryan:

19 is likely to have difficulty maintaining attention and concentration
20 for extended periods; performing activities within a schedule;
21 making complex work-related decision; completing a normal
22 workday and workweek without interruptions from
23 psychologically based symptoms and performing at a consistent
pace without an unreasonable number and length of rest periods.
She appears to have some limitation and social interactions. She
may have difficulty working in coordination with or proximity to
others without being distracted by them. She would have difficulty
adapting to new or unfamiliar situations or environments.

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 Tr. 20 (citing Tr. 408-09). The ALJ stated “great weight is given to Dr. Woodward’s opinion
2 because it is consistent with the record as a whole.” *Id.* Although the ALJ gave great weight to
3 Dr. Woodward’s opinions, the ALJ’s RFC determination fails to account for the doctor’s opinion
4 that Ms. O’Ryan has difficulty maintaining attention and concentration for extended periods;
5 difficulty performing activities within a schedule and completing a normal workday and
6 workweek without interruptions from psychologically based symptoms; and difficulty
7 performing at a consistent pace without an unreasonable number and length of rest periods.

8 The Commissioner argues the ALJ’s RFC determination accounts for all of these
9 limitations. The argument is contradicted by the record as the RFC determination plainly fails to
10 account for the limitations listed above. The Commissioner also argues that Dr. Woodward “did
11 not assess any specific work related limitations” and did not “provide any evidence requiring the
12 ALJ to develop.” Dkt. 10 at 11-12. This argument contradicts the first. In the first, the
13 Commissioner claims the ALJ accounted for all limitations. In the second, the Commissioner
14 claims the doctor assessed no limitations, and hence there was nothing for the ALJ to “develop”
15 or include in the RFC.

16 The second argument not only contradicts the first argument, it is also belied by the
17 record. The ALJ recited Dr. Woodward’s opinions and gave them “great weight.” There is
18 nothing in the ALJ’s decision supporting the notion that the ALJ found the doctor did not assess
19 functional limitations. Nor is there anything in the ALJ’s decision indicating the ALJ rejected
20 portions of Dr. Woodward’s opinions. The Commissioner’s argument is thus little more than
21 speculation. At most, it is an improper post-hoc rationalization that this Court cannot rely on to
22 affirm the ALJ. *See Pinto v. Massanari*, 249 F.3d 840, 847-48 (9th Cir. 2001). The Court
23 reviews the ALJ’s decision “based on the reasoning and findings offered by the ALJ—not post

1 hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v.*
2 *Comm’r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 1995).

3 In sum, the ALJ erroneously failed to account for limitations Dr. Woodward assessed.
4 The error is harmful because the RFC and hypothetical questions to a vocational expert must
5 include all of the claimant’s limitations; they did not. *See* 20 C.F.R. § 416.945(a); *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002).

7 **B. Ms. O’Ryan’s Testimony**

8 Ms. O’Ryan argues that the ALJ erroneously discounted her symptom testimony. Revised
9 Social Security Ruling (“SSR”) 16-3p, 2017 WL 5180304, at *13, directs the ALJ as to how he
10 or she should evaluate a claimant’s statements.⁴ The SSR has an effective date of March 28,
11 2016, and thus applies to the ALJ’s decision here. SSR 16-3p eliminates the use of the term
12 “credibility” and instead focuses on an evidence-based analysis of the administrative record to
13 determine whether the nature, intensity, frequency, or severity of an individual’s symptoms
14 impact his or her ability to work. The SSR also states “in evaluating an individual’s symptoms, it
15 is not sufficient for our adjudicators to make a single conclusory statement that “the individual’s
16 statements about his or her symptoms have been considered,” or that “the statement about the
17 individual’s symptoms are (or are not) supported or consistent.” Further “the determination must
18 contain specific reasons for the weight given to the individual’s symptoms, be consistent with
19 and supported by the evidence, and be clearly articulated.”

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21 ⁴ SSRs do not have the force of law. Nevertheless, they “constitute Social Security
22 Administration (SSA) interpretations of the statute it administers and of its own regulations,” and
23 are binding on all SSA adjudicators. 20 C.F.R. § 402.35(b); *Holohan v. Massanari*, 246 F.3d
195, 1203 n.1 (9th Cir. 2001). Accordingly, such rulings are given deference by the courts
“unless they are plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*,
882 F.2d 1453, 1457 (9th Cir. 1989).

1 SSR 16-3p does not, however, alter the standards by which courts will evaluate an ALJ's
2 reasons for discounting a claimant's testimony. To reject a claimant's complaints, an ALJ must
3 provide "specific, cogent reasons" and, absent affirmative evidence of malingering, must have
4 "clear and convincing" reasons for rejecting a claimant's testimony. *Morgan v. Commissioner of*
5 *SSA*, 169 F.3d 595, 599 (9th Cir. 1999); *see Carmickle v. Commissioner, SSA*, 533 F.3d 1155,
6 1160 (9th Cir. 2008).⁵

7 The ALJ rejected Ms. O'Ryan's testimony as inconsistent with her medical treatment
8 record. Tr. 19. Substantial evidence does not support the finding. The ALJ found Ms. O'Ryan
9 improved with treatment after her admission for in-patient care in 2013. *Id.* But while Ms.
10 O'Ryan might have improved from illness so severe she had to be hospitalized, there is nothing
11 showing her improvement contradicts her testimony. In fact her testimony tends to be supported
12 by Dr. Woodward's evaluation in which the doctor found significant functional impairments, all
13 of which the ALJ accorded great weight.

14 The ALJ also discounted Ms. O'Ryan's testimony on the grounds she did not receive the
15 type of medical treatment one would expect of a disabled individual and because she has gaps in
16 her mental health treatment history. Tr. 20. But the ALJ must also consider possible reasons Ms.
17 O'Ryan did not obtain more treatment for her mental illness symptoms. This is particularly
18 important in the case of mental impairments, because a person suffering from a mental illness
19 may not realize that he needs medication or even that his "condition reflects a potentially serious
20 mental illness." *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). For this reason, it is "a
21 questionable practice to chastise one with a mental impairment for the exercise of poor judgment

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23 ⁵ In *Carmickle*, the Ninth Circuit rejected the proposition that there had to be a specific *finding* of
malingering; rather, it was sufficient that there be *affirmative evidence* suggesting malingering.
See Carmickle, 533 F.3d at 1160 n.1.

1 in seeking rehabilitation.” *Id.* The ALJ thus erred in discounting Ms. O’Ryan’s testimony on the
2 grounds that she did not get more mental health treatment and/or had gaps in her mental health
3 treatment.

4 The ALJ also discounted Ms. O’Ryan’s testimony as inconsistent with her daily
5 activities. Tr. 20. The ALJ noted Ms. O’Ryan can groom herself, go outside once a day, change
6 and count money, watch T.V., go to the store, and spend time with friends. These minimal
7 activities are an insufficient basis to reject Ms. O’Ryan’s testimony. The ALJ may not penalize a
8 claimant for attempting to live a normal life in the face of her limitations. *See Cooper v. Bowen*,
9 815 F.2d 557, 561 (9th Cir. 1987). The Ninth Circuit “has repeatedly asserted that the mere fact
10 that a plaintiff has carried on certain daily activities . . . does not in any way detract from her
11 credibility as to her overall disability.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007 (*quoting*
12 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)).

13 Of course the ALJ may consider contradictions between a claimant’s reported activities
14 and her asserted limitations. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.
15 1999). Here the ALJ noted Ms. O’Ryan reported difficulty with personal care and the need for
16 reminders. However, these difficulties appear consistent with Dr. Woodward’s observation that
17 Ms. O’Ryan dressed “casually,” her hair was “a bit disheveled,” and that Ms. O’Ryan was late
18 for the evaluation and had to call “for additional directions.” Tr. 404-05.

19 And finally the ALJ rejected Ms. O’Ryan’s testimony because she stopped working in
20 2011 for reasons unrelated to disability and because her sporadic work history raises questions
21 whether she is actually disabled. Tr. 21. Substantial evidence does not support the first ground to
22 reject Ms. O’Ryan’s testimony. The ALJ did not identify any evidence establishing Ms. O’Ryan
23 was able to work in 2011 and stopped for non-disability reasons. The facts regarding the 2011

1 job and how the job ended are unclear. If anything, the record suggests the 2011 work attempt
2 was short-lived and a failure—Ms. O’Ryan’s reported FICA earnings for that year is zero. Tr.
3 226.

4 As to Ms. O’Ryan’s sporadic work history, this is “character” evidence that runs afoul of
5 SSR 16-3p’s directive that:

6 [i]n evaluating an individual’s symptoms, our adjudicators will not
7 assess an individual’s overall character or truthfulness in the
8 manner typically used during an adversarial court litigation. The
9 focus of the evaluation of an individual’s symptoms should not be
10 to determine whether he or she is a truthful person. Rather, our
11 adjudicators will focus on whether the evidence establishes a
medically determinable impairment that could reasonably be
expected to produce the individual’s symptoms and given the
adjudicators evaluation of the individual’s symptoms, whether the
intensity and persistence of the symptoms limit the individual’s
ability to perform work-related activities

12 2017 WL 5180304, at *11. The ALJ erroneously focused on whether Ms. O’Ryan could work
13 prior to the time that she claims she became disabled. The suggestion is that Ms. O’Ryan is not
14 credible because her sporadic work history indicates that although she could perform work in the
15 past, she was too lazy to do so; ergo, she is not credible now as to the severity of her mental
16 health problems. This type of credibility assessment cannot be squared with the SSR’s directive
17 that the adjudicator “will not assess an individual’s overall character or truthfulness.”

18 Accordingly, the Court concludes the ALJ erred in rejecting Ms. O’Ryan’s testimony.

19 **C. New and Material Evidence**

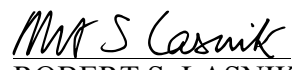
20 The Court need not address whether the evaluation offered by Phyllis Sanchez, Ph.D., is
21 new and material evidence that mandates remand because, as noted above, the ALJ erred and the
22 matter will be remanded for further proceedings. On remand, the ALJ and parties may address
23 Dr. Sanchez’s evaluation and any other evidence relevant to Ms. O’Ryan’s disability claim.

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CONCLUSION

The Court **REVERSES** the Commissioner’s final decision and **REMANDS** the case for further administrative proceedings under sentence four of 42 U.S.C. § 405(g) On remand, the ALJ shall reassess Dr, Woodward’s opinions and Ms. O’Ryan’s testimony, develop the record and reevaluate Ms. O’Ryan’s RFC as needed and proceed to step five.

Dated this 7th day of March, 2018.


ROBERT S. LASNIK
United States District Judge