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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHANIE B,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 2:21-CV-462-DWC

ORDER REVERSING AND
REMANDING DEFENDANT’S
DECISION TO DENY BENEFITS

Plaintiff 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). The parties have consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; and Local Magistrate Judge Rule MJR 13.

BACKGROUND

Plaintiff filed her claim for benefits in January 2018, alleging she became disabled August 1, 2017. Administrative Record (AR) 223. Plaintiff’s claim was denied initially (AR 14) and upon reconsideration (AR 130). A hearing was held before an Administrative Law Judge

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1 (ALJ) in March 2020 (AR 43-73) and on March 25, 2020 the ALJ denied Plaintiff's claim (AR
2 37). The Appeals Council denied Plaintiff's request for review on February 2, 2021, making the
3 ALJ's decision final. AR 93; 20 C.F.R. §§ 404.981, 416.1481.

4 On appeal to this Court, Plaintiff maintains the ALJ erred by erroneously discrediting
5 some of Plaintiff's subjective symptom allegations and improperly rejecting some medical
6 evidence. Dkt. 13 at 1. In addition, Plaintiff argues that her administrative proceedings were
7 "tainted" by the unconstitutional appointment of the then-Commissioner of Social Security. *Id.* at
8 14.

9 THE ALJ's FINDINGS

10 The ALJ found Plaintiff had the severe impairments of depressive disorder, anxiety
11 disorder, attention deficit hyperactivity disorder, fibromyalgia, and obesity. AR 20. Although the
12 record contained evidence that Plaintiff worked since her alleged onset date of disability, the
13 ALJ determined this work did not constitute substantial gainful activity. *Id.* The ALJ also
14 determined that Plaintiff had the residual functional capacity (RFC) to perform light work as
15 defined in 20 CFR 416.967(b), limited by no climbing of ladders, ropes, or scaffolds; no
16 crawling; only occasional balancing, stooping, kneeling, or crouching; no concentrated exposure
17 to excessive vibration, pulmonary irritants, or hazards; and only simple, routine tasks with no
18 more than superficial interaction with co-workers, no activities requiring teamwork, and no
19 contact with the general public. AR 22. A vocational expert testified that a person with this RFC,
20 age, education, and work experience would be capable of performing work as a small products
21 assembler, agricultural produce sorter, and marker—all jobs existing in substantial numbers in
22 the national economy. AR 36. Consequently, the ALJ determined that Plaintiff was not disabled
23 during the period under review. AR 37.

1 See 20 C.F.R. §§ 404.1502, 416.902; 82 F. Reg. 8544; 82 F. Reg. 15263. The Commissioner also
2 clarified that all medical sources, not just acceptable medical sources, can provide evidence that
3 will be considered medical opinions. See 20 C.F.R. §§ 404.1502, 416.902; 82 F. Reg. 8544; 82 F.
4 Reg. 15263.

5 Additionally, the new regulations state the Commissioner “will no longer give any
6 specific evidentiary weight to medical opinions; this includes giving controlling weight to any
7 medical opinion.” Revisions to Rules Regarding the Evaluation of Medical Evidence, 2017 WL
8 168819, 82 Fed. Reg. 5844, at 5867-68 (Jan. 18, 2017); see also 20 C.F.R. §§ 404.1520c (a),
9 416.920c(a). Instead, the Commissioner must consider all medical opinions and “evaluate their
10 persuasiveness” based on supportability, consistency, relationship with the claimant,
11 specialization, and other factors. 20 C.F.R. §§ 404.152c(c); 416.920c(c). The most important
12 factors are supportability and consistency. 20 C.F.R. §§ 404.152c(a), (b)(2); 416.920c(a), (b)(2).

13 Although the regulations eliminate the “physician hierarchy,” deference to specific
14 medical opinions, and assigning “weight” to a medical opinion, the ALJ must still “articulate
15 how [he] considered the medical opinions” and “how persuasive [he] find[s] all of the medical
16 opinions.” 20 C.F.R. §§ 404.1520c(a), (b)(1); 416.920c(a), (b)(1). The ALJ is specifically
17 required to “explain how [he] considered the supportability and consistency factors” for a
18 medical opinion. 20 C.F.R. §§ 404.1520c(b)(2); 416.920c(b)(2).

19 The Ninth Circuit has not yet had the opportunity to address the impact of the new
20 regulations on the requirement that the ALJ provide “clear and convincing” reasons for rejecting
21 an uncontradicted physician’s opinion and “specific and legitimate reasons” for rejecting a
22 contracted physician’s opinion. *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995). However,
23 Chief Judge Ricardo S. Martinez has opined that he believes the Ninth Circuit will not likely
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1 alter the “clear and convincing” standard because it is “based on evidentiary principles in
2 administrative law, and not on a hierarchy of opinions.” *Kathleen G. v. Comm. Soc. Sec.*, No.
3 2:20-cv-461-RSM (W.D. Wash. Nov. 10, 2020) (citing *Day v. Weinberger*, 522 F.2d 1154, 1156
4 (9th Cir. 1975) and *White Glove Building Maintenance, Inc. v. Brennan*, 518 F.2d 1271 (9th Cir.
5 1975)).

6 Thus, while the new regulations ask the ALJ to explain, at a minimum, how the ALJ
7 considered the supportability and consistency factors of a medical opinion, if the medical opinion
8 is uncontradicted the ALJ must still cite “clear and convincing” reasons for rejecting it, and if it
9 is contradicted, the ALJ must still give “specific and legitimate” reasons for rejecting it.

10 II. Analysis

11 The ALJ discussed the findings of Anselm Parlatore, M.D. and Jenna Yun, Ph.D. in
12 tandem, so the Court will do the same.

13 In October 2018, Anselm Parlatore, M.D. (Parlatore), conducted a psychiatric functional
14 evaluation of Plaintiff and reviewed unspecified nursing records. AR 33-34; AR 611-615. He
15 opined that Plaintiff’s “social interaction and adaptation” were markedly impaired and that her
16 “interpersonal interactions are markedly affected by her emotional symptoms [and that she]
17 would have moderate to severe difficulty dealing with the usual stress encountered in a work
18 environment.” AR 614.

19 Just over a year later, in November 2019, Jenna Yun, Ph.D. (Yun) conducted another
20 psychiatric evaluation of Plaintiff, and opined that she had markedly severe impairments in the
21 ability to: adapt to changes in a routine work setting; make simple work-related decisions;
22 communicate and perform effectively in a work setting; maintain appropriate behavior in a work
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1 setting; and complete a normal work day and work week without interruptions from
2 psychologically based symptoms. AR 1037-1050.

3 The ALJ found Parlatore and Yun’s opinions to be “persuasive” but determined “the
4 [above described] portion of their opinions regarding the marked extent of the claimant’s social
5 and adaptive functioning [was] not supported by their own examination of the claimant [or]
6 consistent with the claimant’s longitudinal medical record ...”. AR 34. The ALJ further found
7 Parlatore’s diagnosis of panic attacks, “which appears to have informed his extreme limitations,”
8 was belied by Plaintiff’s frequent *denial* of experiencing panic attack symptoms. AR 35. Further,
9 the ALJ interpreted Yun’s findings to be unsupported by her own examination, and noted that
10 Yun did not review any other medical records. *Id.* Ultimately, the ALJ concluded that Parlatore
11 and Yun based their findings on Plaintiff’s self-reporting about her symptoms and functional
12 limitations, which was “consistently out of proportion with her presentation during medical
13 appointments.” *Id.*

14 This Court finds the ALJ’s reasons for rejecting Parlatore and Yun’s opinions to be
15 conclusory and unsupported by substantial evidence. *See Embrey v. Bowen*, 849 F.2d 418, 421-
16 422 (9th Cir. 1988) (“it is incumbent on the ALJ to provide detailed, reasoned, and legitimate
17 rationales for disregarding the physicians’ findings[;]” conclusory reasons do “not achieve the
18 level of specificity” required to justify an ALJ’s rejection of an opinion); *see also, McAllister v.*
19 *Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989) (an ALJ’s rejection of a physician’s opinion on the
20 ground that it was contrary to clinical findings in the record was “broad and vague, failing to
21 specify why the ALJ felt the treating physician’s opinion was flawed”).

22 Among the errors the ALJ committed was engaging in evidentiary “cherry-picking,”
23 wherein he honed-in on portions of the record unrelated to one of the above assessed “marked”
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1 limitations, and overlooked evidence directly supporting these limitations. *See e.g.*, AR 551
 2 (Plaintiff was anxious and fidgety); AR 552 (Plaintiff continues to present anxious); AR 556
 3 (Plaintiff had trouble focusing; anxious); AR 565 (Plaintiff highly anxious; overwhelmed with
 4 hard time staying on track); AR 568 (Plaintiff triggered by things people say); AR 569 (Plaintiff
 5 needed additional help to complete homework); AR 578 (Plaintiff had a hard time following
 6 instructions). Such “cherry-picking” of the evidence is highly disfavored in this circuit. *See*
 7 *Reddick v. Chater*, 157 F.3d 715 at 722-23 (9th Cir. 1998) (an ALJ must not “cherry-pick” certain
 8 observations without considering their context); *see also Attmore v. Colvin*, 827 F.3d 872, 875
 9 (9th Cir. 2016) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (the Court “cannot
 10 affirm ... ‘simply by isolating a specific quantum of supporting evidence,’ but ‘must consider the
 11 record as a whole, weighing both evidence that supports and evidence that detracts from the
 12 [Commissioner’s] conclusion”).

13 Another of the ALJ’s flaws was his tendency to “play doctor” by supplanting Parlatore
 14 and Yuns’ interpretation of their own mental status exams (MSEs)¹ with his own interpretation.
 15 *See Hanford v. Colvin*, 2:16-cv-921-JRC, 2016 WL 7404449, at *5 (W.D. Wash. 2016)(*citing*
 16 *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (“judges, including administrative law
 17 judges of the Social Security Administration, must be careful not to succumb to the temptation to
 18 play doctor. The medical expertise of the Social Security Administration is reflected in
 19 regulations; it is not the birthright of the lawyers who apply them. Common sense can mislead;

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 22 ¹ The Court notes that “experienced clinicians attend to detail and subtlety in behavior, such as the affect
 23 accompanying thought or ideas, the significance of gesture or mannerism, and the unspoken message of
 24 conversation[.] The Mental Status Examination allows the organization, completion and communication of these
 observations.” Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination* 3 (Oxford
 University Press 1993). “Like the physical examination, the Mental Status Examination is termed the objective
 portion of the patient evaluation.” *Id.* at 4 (emphasis in original).

1 lay intuitions about medical phenomena are often wrong”) (internal citations omitted)); *see also*
2 *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989) (an ALJ’s rejection of a physician’s
3 opinion on the ground that it was contrary to clinical findings in the record was “broad and
4 vague, failing to specify why the ALJ felt the treating physician’s opinion was flawed”).

5 Both Parlatore and Yun are experienced clinicians who performed MSEs on Plaintiff, and
6 were the most qualified people to interpret their own findings and render an opinion about
7 Plaintiff’s functional capacity. Yet, the ALJ speculated that Parlatore’s diagnosis of panic attacks
8 was the predominate basis for his “marked” findings, and that Yun’s statements regarding
9 Plaintiff’s social functioning were inconsistent with her examination and must have been based
10 upon Plaintiff’s self-reporting. The ALJ did not explain the rationale for these conclusions,
11 which were speculative at best, and insufficient to supplant the medical opinions of trained
12 clinicians. *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (“Psychiatric evaluations
13 may appear subjective, especially compared to evaluations in other medical fields. Diagnoses
14 will always depend in part on the patient’s self-report as well as on the clinician’s observations
15 of the patient. But such is the nature of psychiatry.”).

16 In addition to erroneously evaluating Parlatore and Yun’s opinions, the Court concurs
17 with Plaintiff that the ALJ’s reasons for rejecting the opinion of Patricia Leckenby, ARNP
18 (Leckenby), was not based upon substantial record evidence. Dkt. 13 at 12-13.

19 In February 2018, Leckenby co-authored (together with a mental health counselor), a
20 “mental residual functional capacity assessment, opining that Plaintiff’s “major depressive
21 disorder, posttraumatic stress disorder, and attention deficit hyperactivity disorder generally
22 caused between a marked limitation (defined as a limitation that seriously limited the ability to
23 function) and extreme limitation (defined as an inability to function) across all mental
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1 functioning domains and that she would be off-task 20% of a normal workday and be absent
2 25% to 50% of a normal workday or workweek.” AR 35; AR 345-348. The ALJ found these
3 assessments unpersuasive, concluding that they were inconsistent with Plaintiff’s longitudinal
4 medical record and Leckenby’s own treatment notes. *Id.*

5 Leckenby treated Plaintiff 26 times between May 2017 and February 2018, during which
6 period Plaintiff was actively engaged in counseling and prescription medication trials. *See* AR
7 351. The “longitudinal record” from this period reflects periods of improvement (AR 371) and
8 periods of decline (AR 370). Here again, the ALJ’s myopic focus on treatment notes arguably
9 inconsistent with Leckenby’s assessment amounts to disfavored evidentiary “cherry-picking”
10 (*Reddick*, 157 F.3d at 722-23), and the ALJ’s substitution of his own “medical” judgment in
11 place of the treating source’s opinion of her own findings is manifestly erroneous (*Hanford*,
12 2016 WL 7404449, at *5).

13 Harmless error principles apply in the Social Security context. *Molina v. Astrue*, 674 F.3d
14 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
15 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
16 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). The determination
17 as to whether an error is harmless requires a “case-specific application of judgment” by the
18 reviewing court, based on an examination of the record made “‘without regard to errors’ that do
19 not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118-1119 (*quoting Shinseki v.*
20 *Sanders*, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. § 2111)).

21 Here, the “marked” limitations improperly rejected by the ALJ were not included in
22 Plaintiff’s RFC. If these limitations should have been included, their omission resulted in error
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1 that cannot be considered harmless. Consequently, this matter must be reversed and remanded
2 for reevaluation of the above medical evidence.

3 Plaintiff also maintains that the ALJ erred by erroneously discrediting some of her
4 subjective symptom allegations. Since this Court concludes that the ALJ committed harmful
5 error in his assessment of the medical opinion evidence, and the ALJ's reconsideration of the
6 medical evidence may impact his assessment of Plaintiff's subjective symptom testimony, the
7 ALJ must reconsider this evidence on remand.

8 Finally, Plaintiff asserts that her administrative proceedings were "tainted" by the
9 unconstitutional appointment of the then-Commissioner of Social Security. This District has
10 found this claim to be meritless. *See Tyler B. v. Commissioner of Social Security*, Case No. 2:20-
11 CV-1572-DWC (W.D. Wash. Oct. 8, 2021); *Lisa Y. v. Commissioner of Social Security*, --
12 F.Supp.3d --, 2021 WL 5177363, at *5-8 (W.D. Wash. Nov. 8, 2021). In light of previous Court
13 decisions and the remand in this case, the Court declines to further consider this claim.

14 CONCLUSION

15 For the foregoing reasons, the Court hereby finds the ALJ improperly concluded that
16 Plaintiff was not disabled. Accordingly, this matter be REVERSED and REMANDED to the
17 Commissioner, pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings
18 consistent with this order.

19 Dated this 7th day of January, 2022.

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21 David W. Christel
22 United States Magistrate Judge
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