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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 CLARENCE BRUCE JOHNSON,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting  
14 Commissioner of the Social Security  
15 Administration,

16 Defendant.

CASE NO. 13-cv-05742 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
19 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United  
20 States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos.  
21 12, 16, 17).

22 After considering and reviewing the record, the Court finds that the ALJ erred  
23 when reviewing the medical evidence from examining doctor, Dr. Heilbrunn. Although  
24 the ALJ found that Dr. Heilbrunn relied on plaintiff's subjective statements, the record

1 demonstrates otherwise. Similarly, although the ALJ found that plaintiff's activities  
2 demonstrated that he could function greater than he alleged, none of the activities noted  
3 by the ALJ are inconsistent with Dr. Heilbrunn's opinion.

4 Therefore, the ALJ failed to provide specific and legitimate reasons supported by  
5 substantial evidence in the record for discounting Dr. Heilbrunn's opinion; this matter  
6 must be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the  
7 Acting Commissioner for further consideration.

### 8 BACKGROUND

9  
10 Plaintiff, CLARENCE BRUCE JOHNSON, was born in 1959 and was 50 years  
11 old on the alleged date of disability onset of January 10, 2010 (*see* Tr. 191-92). Plaintiff  
12 attended school to the seventh grade and obtained his GED while in prison (Tr. 48).  
13 Plaintiff owned and operated a recycling business until he became unable to work (Tr.  
14 48-51, 203).

15 According to the ALJ, plaintiff has at least the severe impairments of  
16 "degenerative disc disease and restless leg syndrome (20 CFR 404.1520(c))" (Tr. 22).

17 At the time of the hearing, plaintiff was living in a rental house (Tr. 56).

### 18 PROCEDURAL HISTORY

19  
20 Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42  
21 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following  
22 reconsideration (*see* Tr. 96-105, 109-115, 191-92). Plaintiff's requested hearing was held  
23 before Administrative Law Judge Kimberly Boyce ("the ALJ") on February 27, 2012  
24 (*see* Tr. 34-85). On March 22, 2012, the ALJ issued a written decision in which she

1 concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr.17-  
2 33).

3 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or  
4 not the ALJ erred in evaluating the medical opinion source evidence in the record; (2)  
5 Whether or not the ALJ erred in assessing the plaintiff's credibility and pain testimony;  
6 (3) Whether or not the ALJ erred when evaluating plaintiff's past relevant work; and (4)  
7 Whether or not the ALJ erred by failing to consider the effects of plaintiff's medication  
8 on his ability to work (*see* ECF No. 12, pp. 1-2).  
9

#### 10 STANDARD OF REVIEW

11 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
12 denial of social security benefits if the ALJ's findings are based on legal error or not  
13 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
14 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
15 1999)).

#### 16 DISCUSSION

##### 17 (1) **Whether or not the ALJ erred in evaluating the medical opinion source** 18 **evidence in the record.**

19 Plaintiff contends that the ALJ erred by rejecting the opinions of Dr. Mark  
20 Heilbrunn, M.D., who examined plaintiff on March 8, 2011 (*see* Tr. 245-51). Although  
21 plaintiff contends that Dr. Heilbrunn's opinion is uncontradicted, his opinion is  
22 contradicted by the opinion of the state agency medical consultant, nonexamining  
23 physician, Dr. Norman Staley, M.D. (*see* Tr. 101-03).  
24

1 The ALJ must provide “clear and convincing” reasons for rejecting the  
2 uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81  
3 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.  
4 1988). But when an examining physician’s opinion is contradicted, that opinion can be  
5 rejected “for specific and legitimate reasons that are supported by substantial evidence in  
6 the record.” *Id.* at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995);  
7 *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

8  
9 Although defendant contends that the ALJ rejected Dr. Heilbrunn’s opinion  
10 because it was inconsistent with plaintiff’s subjective statements to Dr. Heilbrunn, the  
11 ALJ made no such finding. According to the Ninth Circuit, “[l]ong-standing principles of  
12 administrative law require us to review the ALJ’s decision based on the reasoning and  
13 actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit  
14 what the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219,  
15 1225-26 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other  
16 citation omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we  
17 may not uphold an agency’s decision on a ground not actually relied on by the agency”)  
18 (citing *Chenery Corp, supra*, 332 U.S. at 196).

19  
20 While an ALJ can reject an opinion if it based entirely on plaintiff’s subjective  
21 reports, Dr. Heilbrunn did not rely entirely on plaintiff’s subjective reports. Plaintiff  
22 reported to Dr. Heilbrunn that he was not limited in sitting other than positional changes  
23 (see Tr. 246). Nevertheless, Dr. Heilbrunn concluded that plaintiff only could sit for a  
24 total of five hours in an eight hour workday. The ALJ incorrectly stated that he

1 discounted Dr. Heilbrunn's opinion in part by finding that the "unremarkable objective  
2 findings noted on examination" demonstrated that Dr. Heilbrunn relied to some extent on  
3 plaintiff's subjective description of his symptoms and limitations (*see* Tr. 28). However,  
4 it is clear from a review of the record that Dr. Heilbrunn did not rely on plaintiff's  
5 subjective statements for his opinion limiting plaintiff to sitting for a total of five hours in  
6 an eight hour workday, as plaintiff reported to Dr. Heilbrunn that he was not limited in  
7 sitting other than positional changes (*see* Tr. 246). Had Dr. Heilbrunn relied on plaintiff's  
8 subjective statements as opposed to his own observation and review of objective  
9 evidence, Dr. Heilbrunn would have opined that plaintiff had no limitations on sitting  
10 other than the need to change position. Therefore, to the extent that the ALJ found that  
11 Dr. Heilbrunn relied on plaintiff's subjective reports for his opinion that plaintiff only  
12 could sit for a total of five hours in an eight hour workday, this finding is not based on  
13 substantial evidence in the record as a whole.

15 In addition, the Court concludes that the ALJ appears to have provided her own  
16 interpretation of Dr. Heilbrunn's examination results by characterizing them as  
17 "unremarkable" (*see* Tr. 28). However, as noted by plaintiff:

18 Dr. Heilbrunn noted midline and paraspinous tenderness of the spine and  
19 postural range of motion limitation of the lumbar spine (internal citation  
20 to Tr. 520). The range of motion of the lumbar spine was significantly  
21 limited. Dr. Heilbrunn noted that the claimant's flexion was 15 degrees.  
Normal flexion of the lumbar spine is 90 degrees. (Internal citation to  
*Scivally v. Sullivan*, 966 F.2d 1070, 1073 fn.1 (7th Cir. 1992)).

22 (Opening Brief, ECF No. 12, p. 5).

1 Plaintiff's characterization of the record is accurate, as Dr. Heilbrunn noted  
2 tenderness on examination, as well as spinal flexion of 15 degrees (*see* Tr. 248-49). The  
3 Court concludes that the ALJ's provision of her own interpretation of Dr. Heilbrunn's  
4 examination results as "unremarkable" does not provide support for her determination to  
5 not credit fully Dr. Heilbrunn's opinion that plaintiff could sit for only five hours in an  
6 eight hour work day. An ALJ must explain why her own interpretations, rather than those  
7 of the doctors, are correct. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (*citing*  
8 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).  
9

10 The only other reason provided by the ALJ for her failure to credit fully Dr.  
11 Heilbrunn's opinions was that plaintiff's activities "support greater functioning than  
12 alleged, particularly with regard to the claimant's ability to perform sitting" (*see* Tr. 28).  
13 This appears to be a justification for failing to credit Dr. Heilbrunn's opinion because of  
14 the ALJ's previous finding that his opinion was based on plaintiff's subjective reports.  
15 However, as discussed, such a finding by the ALJ is not supported by substantial  
16 evidence in the record.

17 In addition, the ALJ's reference to plaintiff's activities does not encompass a  
18 legitimate reason for her failure to credit fully Dr. Heilbrunn's opinion, as none of the  
19 activities mentioned by the ALJ demonstrate that plaintiff is capable of sitting for more  
20 than five hours within the context of an eight hour workday. Even if plaintiff's credibility  
21 was not credited fully, the ALJ nevertheless must provide specific and legitimate reasons  
22 for rejecting an examining doctor's opinion, especially in the situation such as this one, in  
23 which the doctor provides independent observations in support of his opinion.  
24

1 For the reasons stated and based on the relevant record, the Court concludes that  
2 the ALJ did not provide specific and legitimate reasons based on substantial evidence in  
3 the record as a whole for her failure to credit fully Dr. Heilbrunn's opinion. The Court  
4 also concludes that this error is not harmless error.

5 The Ninth Circuit has "recognized that harmless error principles apply in the  
6 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
7 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th  
8 Cir. 2006) (collecting cases)). Here, the ALJ failed to credit Dr. Heilbrunn's opinion that  
9 plaintiff could sit for only five hours in an eight hour work day, and instead found that  
10 plaintiff could sit for six hours in an eight hour work day in her residual functional  
11 capacity [RFC] analysis (see Tr. 24). The ALJ's step four and step five findings were  
12 based on this RFC, and as the steps four and five findings may be different when based  
13 on an RFC that includes a sitting limitation to less than six hours in an eight hour  
14 workday, this matter must be evaluated anew.

16 (2) **Whether or not the ALJ erred in assessing the plaintiff's credibility**  
17 **and pain testimony.**

18 The Court already has concluded that the ALJ erred in reviewing the medical  
19 evidence and that this matter should be reversed and remanded for further consideration,  
20 see *supra*, section 1. In addition, a determination of a claimant's credibility relies in part  
21 on the assessment of the medical evidence. See 20 C.F.R. § 404.1529(c). Therefore, for  
22 this reason, plaintiff's credibility should be assessed anew following remand of this  
23 matter, as should any allegations of side effects from medication.

1 (3) **Whether or not the ALJ erred by treating the plaintiff's past relevant**  
2 **"composite job" work as a recycling yard operator as two separate**  
3 **jobs and then finding him capable of performing the least demanding**  
4 **job.**

5 Similarly, as this matter must be reversed and remanded for further consideration  
6 of the medical evidence, *see supra*, section 1, steps four and five of the sequential  
7 disability evaluation process must be completed anew, as necessary, and the remaining  
8 contentions of plaintiff will not be discussed.

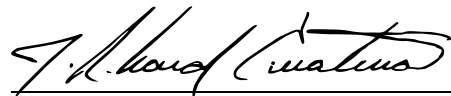
9 CONCLUSION

10 The ALJ erred when reviewing the medical evidence provided by examining  
11 doctor, Dr. Heilbrunn.

12 Based on this reason and the relevant record, the Court **ORDERS** that this matter  
13 be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to  
14 the Acting Commissioner for further consideration.

15 **JUDGMENT** should be for plaintiff and the case should be closed.

16 Dated this 7<sup>th</sup> day of July, 2014.

17 

18 J. Richard Creatura  
19 United States Magistrate Judge  
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