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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 RYAN E. MARION,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL,¹

12 Defendant.

CASE NO. C16-5765JLR

ORDER REVERSING AND
REMANDING FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS

13
14 **I. INTRODUCTION**

15 Plaintiff Ryan E. Marion seeks review of the denial of his application for disability
16 insurance benefits. Mr. Marion contends that the Administrative Law Judge (“ALJ”)
17 erred in evaluating the medical evidence in the record, evaluating the disability finding by
18 the Department of Veterans Affairs (“VA”), evaluating Mr. Marion’s testimony,
19 assessing his residual functional capacity (“RFC”), and finding him capable of
20 performing work available in the national economy. (Op. Br. (Dkt. # 9) at 1.) Having
21 considered the submissions of the parties, the relevant portions of the record, and the

22 ¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security
23 Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is
substituted for Carolyn W. Colvin as Defendant in this suit. The court DIRECTS the Clerk to
update the docket, and all future filings by the parties should reflect this change.

1 applicable law, the court REVERSES Defendant Commissioner Nancy A. Berryhill's
2 ("the Commissioner") final decision and REMANDS the matter for further administrative
3 proceedings under sentence four of 42 U.S.C. § 405(g).

4 II. BACKGROUND

5 On May 5, 2015, Mr. Marion filed an application for disability insurance benefits.
6 (Administrative Record ("AR") (Dkt. # 6) at 17.) Mr. Marion's application was denied
7 initially and on reconsideration. (*Id.*) After the ALJ conducted a hearing on April 29,
8 2016, the ALJ issued a decision finding Mr. Marion not disabled. (*Id.* at 17-28.)
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10 In her decision, the ALJ utilized the five-step disability evaluation process,² and
11 the court summarizes the ALJ's findings as follows:

12 **Step one:** Mr. Marion has not engaged in substantial gainful activity since March
13 4, 2015, the alleged onset date.

14 **Step two:** Mr. Marion has the following severe impairments: posttraumatic stress
15 disorder ("PTSD"), major depressive disorder, headaches, and labrum tears.

16 **Step three:** Mr. Marion does not have an impairment or combination of
17 impairments that meets or equals the requirements of a listed impairment.³

18 **RFC:** Mr. Marion has the RFC to perform light work as defined in 20 C.F.R.
19 § 404.1567(b) except he can occasionally balance, stoop, kneel, crouch, crawl, and
20 climb ramps or stairs, but cannot climb ladders, ropes, or scaffolds. He needs to
21 avoid concentrated exposure to vibration and hazards such as working near
22 dangerous moving machinery or working at unprotected heights. He can perform
23 simple and detailed tasks but might have difficulty performing more complex
tasks consistently. He can have superficial contact with members of the public
and coworkers, can interact with them briefly, and can work around them. He can
adapt to occasional changes in the work setting.

² 20 C.F.R. § 416.920.

³ 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 ALJ can satisfy this requirement “by setting out a detailed and thorough summary of the
2 facts and conflicting clinical evidence, stating his interpretation thereof, and making
3 findings.” *Id.* The ALJ may also draw inferences “logically flowing from the evidence.”
4 *Sample*, 694 F.2d at 642. Further, the court itself may draw “specific and legitimate
5 inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir.
6 1989).

7 The ALJ must provide “clear and convincing” reasons for rejecting the
8 uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81
9 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician’s opinion is
10 contradicted, that opinion “can only be rejected for specific and legitimate reasons that
11 are supported by substantial evidence in the record.” *Id.* at 830-31.

12 Here, Dr. Tarantino examined Mr. Marion in November 2015 and opined that he
13 was moderately impaired in his ability to interact with coworkers and the public and to
14 maintain regular attendance in the workplace, moderately to markedly impaired in his
15 ability to complete a normal workday or workweek without interruptions from his
16 psychological impairments, and markedly impaired in his ability to deal with typical
17 workplace stress if the work involved being around others. (*See* AR at 1273.) The ALJ
18 gave Dr. Tarantino’s opinion some weight. (*See id.* at 25.) The ALJ found that the
19 identified difficulties interacting with others and completing a workday without
20 interruptions were supported by the medical treatment records. (*See id.*) However, the
21 ALJ found that the marked impairment in handling stress if the work involved being
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1 around others was not supported by the treatment records or Mr. Marion's activities. (*See*
2 *id.*)

3 An ALJ may reject a physician's opinion on the basis that other evidence of the
4 claimant's ability to function, including reported activities, contradicts that opinion. *See*
5 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). Here,
6 during the period at issue, Mr. Marion was able to go to baseball games, take college
7 classes, go on dates, and visit museums and water parks with his son. (*See* AR at 38-39,
8 57-58.) He reported no difficulty getting along with friends, family, neighbors,
9 coworkers, or authority figures. (*See id.* at 205-06.) Therefore, substantial evidence
10 supports the ALJ's finding that Mr. Marion's activities contradicted Dr. Tarantino's
11 opinion that Mr. Marion was markedly impaired in his ability to work around others.
12

13 However, Mr. Marion also argues that the ALJ did not fully incorporate into the
14 RFC the limitations that the ALJ found were supported by the record—that Mr. Marion
15 was moderately impaired in his ability to interact with coworkers and the public and to
16 maintain regular attendance in the workplace and moderately to markedly impaired in his
17 ability to complete a normal workday or workweek without interruptions from his
18 psychological impairments. (*See* Op. Br. at 4.) The Commissioner argues that the ALJ
19 reasonably translated those limitations into an RFC limiting Mr. Marion to simple tasks,
20 superficial contact with others, and only occasional changes in the workplace. (*See* Resp.
21 Br. (Dkt. # 10) at 5-7.) However, the ALJ did not address absenteeism in the RFC. (*See*
22 AR at 21-22.) Also, the ALJ did not incorporate into the RFC any allowances for being
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1 off-task. (*See id.*) This omission constitutes a failure to address Mr. Marion’s moderate
2 to marked limitation in completing a workday or workweek without interruptions from
3 psychological symptoms. Therefore, the ALJ erred by failing to fully incorporate or give
4 reasons to discount part of Dr. Tarantino’s opinion into the RFC.

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. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). “[I]n
8 each case we look at the record as a whole to determine [if] the error alters the outcome
9 of the case.” *Id.* Therefore, “an ALJ’s error is harmless where it is ‘inconsequential to
10 the ultimate nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r, Soc. Sec.*
11 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)). Here, because the ALJ improperly
12 discounted Dr. Tarantino’s opinion in assessing the RFC and found Mr. Marion capable
13 of performing work based on that RFC, the error affected the ultimate disability
14 determination and is not harmless.

16 **B. Evaluation of the VA Determination**

17 Mr. Marion argues that the ALJ erred by failing to provide a persuasive, specific,
18 and valid reason for discounting the VA disability determination in the record. (*See Op.*
19 *Br.* at 7-9.) The court finds no harmful error.

20 Although a determination by the VA about whether a claimant is disabled is not
21 binding on the Social Security Administration (“SSA”), an ALJ must consider that
22 determination in reaching her decision. *See McCartey v. Massanari*, 298 F.3d 1072,
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1 1076 (9th Cir. 2002); 20 C.F.R. § 404.1504. Further, the ALJ “must ordinarily give great
2 weight to a VA determination of disability” because of “the marked similarity” between
3 the two federal disability programs. *See McCartney*, 298 F.3d at 1076. However,
4 “[b]ecause the VA and SSA criteria for determining disability are not identical,” the ALJ
5 “may give less weight to a VA disability rating if [she] gives persuasive, specific, valid
6 reasons for doing so that are supported by the record.” *Id.* (citing *Chambliss v.*
7 *Massanari*, 269 F.3d 520, 522 (5th Cir. 2001)).

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9 Here, the ALJ gave the VA determination only limited weight because, among
10 other reasons, the VA determination was inconsistent with medical records showing that
11 the relevant impairments in the VA determination were well-controlled with treatment.
12 (*See AR at 25-26.*) Although Mr. Marion argues that the ALJ’s other reasons for
13 discounting the VA determination were not persuasive, he fails to address this rationale.
14 (*See Op. Br. at 7-9*); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (holding that
15 matters on appeal not specifically and distinctly argued in opening brief ordinarily will
16 not be considered). Therefore, Mr. Marion fails to meet his burden of proving harmful
17 error here.

18 **C. Evaluation of Mr. Marion’s Testimony**

19 Mr. Marion argues that the ALJ erred in evaluating his subjective complaints.
20 (*See Op. Br. at 9-11.*) The court disagrees.

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22 Questions of credibility are solely the responsibility of the ALJ. *See Sample*, 694
23 F.2d at 642. The court may not second-guess these credibility determinations. *Allen v.*

1 *Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). To reject a claimant’s subjective complaints,
2 the ALJ must provide “specific, cogent reasons for the disbelief.” *Lester*, 81 F.3d at 834
3 (internal citation omitted). The ALJ “must identify what testimony is not credible and
4 what evidence undermines the claimant’s complaints.” *Id.*; *see also Dodrill v. Shalala*,
5 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is
6 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear and
7 convincing.” *Lester*, 81 F.2d at 834.

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9 Mr. Marion argues that the ALJ did not provide specific reasons for rejecting his
10 testimony. (*See Op. Br.* at 10.) However, the ALJ found that although Mr. Marion’s
11 impairments could be expected to cause some of his alleged symptoms, Mr. Marion’s
12 statements concerning the intensity and limiting effects of those symptoms were
13 (1) inconsistent with the medical treatment record and Mr. Marion’s activities, and
14 (2) well-controlled with treatment. (*See AR* at 23-24.) By failing to address why these
15 reasons were not sufficient, Mr. Marion does not meet his burden of showing harmful
16 error. *See Kim*, 154 F.3d at 1000.

17 **D. The RFC Assessment and Step-Five Finding**

18 Mr. Marion next argues that, for reasons beyond those listed above, the RFC and
19 step-five finding are not supported by substantial evidence.⁵ (*See Op. Br.* at 12-15.)
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21 ⁵ Mr. Marion argues in this section that the ALJ erred by failing to address his migraines
22 in the RFC. (*See Op. Br.* at 12-13.) However, Mr. Marion’s argument regarding migraines relies
23 on the ALJ’s purported errors in evaluating the VA determination and Mr. Marion’s testimony.
(*See id.*) As described above, Mr. Marion does not show harmful error in the ALJ’s evaluation
of the VA determination or Mr. Marion’s testimony. *See supra* § III.B., C. The court
accordingly rejects Mr. Marion’s argument regarding migraines.

1 First, Mr. Marion argues that the ALJ failed to account for his sleep apnea, which was not
2 determined to be a severe impairment, in the RFC. (*See id.* at 12.) An ALJ must
3 consider all medically determinable impairments, not just those determined to be severe,
4 when assessing a claimant's RFC. *See* Social Security Ruling 96-8p, 1996 WL 374184,
5 at *2. However, Mr. Marion fails to establish that the ALJ's error was harmful because
6 he identifies no specific functional limitations resulting from his sleep apnea that are
7 missing from the RFC. (*See id.*) *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007);
8 *Molina*, 674 F.3d at 1115.

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10 Next, Mr. Marion argues that the ALJ failed to address the frequency of necessary
11 medical appointments in the RFC. (*See Op. Br.* at 13.) However, Mr. Marion does not
12 show why these appointments would have to occur during work hours and therefore
13 require an accommodation for absenteeism in the RFC on the basis of the frequency of
14 his appointments alone.

15 Finally, Mr. Marion argues that the ALJ failed to address Mr. Marion's need for a
16 service animal in the RFC. (*See id.* at 14-15.) However, Mr. Marion provides no
17 evidence that the service animal was medically necessary other than his own testimony,
18 which the ALJ properly discounted. *See supra* § III.C.

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20 The court finds that the RFC and step-five finding are not supported by substantial
21 evidence due to the ALJ's error in evaluating Dr. Tarantino's opinion. *See supra* § III.A.

22 **E. Remand for Further Proceedings**

23 The court may remand this case "either for additional evidence and findings or to

1 award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when
2 the court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is
3 to remand to the agency for additional investigation or explanation.” *Benecke v.*
4 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual
5 case in which it is clear from the record that the claimant is unable to perform gainful
6 employment in the national economy” that “remand for an immediate award of benefits is
7 appropriate.” *Id.*

8 Benefits may be awarded where “the record has been fully developed” and
9 “further administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at
10 1292; *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits
11 should be awarded where:
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13 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
14 claimant’s] evidence, (2) there are no outstanding issues that must be
15 resolved before a determination of disability can be made, and (3) it is clear
from the record that the ALJ would be required to find the claimant
disabled were such evidence credited.

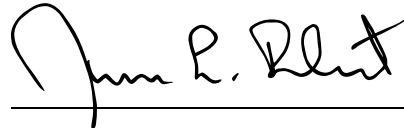
16 *Smolen*, 80 F.3d at 1292; *McCartey*, 298 F.3d at 1076-77. Here, factual issues remain
17 regarding Mr. Marion’s functional capabilities and his ability to perform other jobs
18 existing in significant numbers in the national economy in light of any additional
19 limitations. Accordingly, the court concludes that remand for further consideration is
20 warranted.
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22 IV. CONCLUSION

23 For the foregoing reasons, the court REVERSES the Commissioner’s final

1 decision and REMANDS this case for further administrative proceedings under sentence
2 four of 42 U.S.C. § 405(g).

3 DATED this 2nd day of March, 2017.

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7 JAMES L. ROBART
8 United States District Judge
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