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

10 SCOTT HEWITT,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL,

14 Defendant.

CASE NO. C16-6044JLR

ORDER AFFIRMING  
DEFENDANT'S DECISION TO  
DENY BENEFITS

15 **I. INTRODUCTION**

16 Plaintiff Scott Hewitt seeks review of the denial of his application for disability  
17 insurance benefits. Mr. Hewitt contends that the Administrative Law Judge ("ALJ")  
18 erred in evaluating Mr. Hewitt's testimony and the medical evidence in the record. (Op.  
19 Br. (Dkt. # 14) at 1.) Having considered the submissions of the parties, the relevant  
20 portions of the record, and the applicable law, the court AFFIRMS Defendant  
21 Commissioner Nancy A. Berryhill's ("the Commissioner") final decision and  
22 DISMISSES the case with prejudice.

## II. BACKGROUND

On July 22, 2013, Mr. Hewitt protectively filed an application for disability insurance benefits. (Administrative Record (“AR”) (Dkt. # 9) at 19.) Mr. Hewitt’s application was denied initially and on reconsideration. (*Id.*) After the ALJ conducted hearings on November 14, 2014, and March 17, 2015, the ALJ issued a decision finding Mr. Hewitt not disabled. (*Id.* at 19-37.)

In his decision, the ALJ utilized the five-step disability evaluation process,<sup>1</sup> and the court summarizes the ALJ’s findings as follows:

**Step one:** Mr. Hewitt did not engage in substantial gainful activity during the period from his alleged onset date of June 15, 2004, through his date last insured of March 31, 2009.

**Step two:** Through the date last insured, Mr. Hewitt had the following severe impairments: right shoulder strain; right rotator cuff tear and syndrome, status post-surgical repair; right carpal tunnel syndrome, status post-release; cervical abnormality; regional complex pain syndrome; chronic pain disorder; and major depressive disorder with secondary anxiety.

**Step three:** Through the date last insured, Mr. Hewitt did not have an impairment or combination of impairments that met or equaled the requirements of a listed impairment.<sup>2</sup>

**RFC:** Through the date last insured, Mr. Hewitt had the residual functional capacity (“RFC”) to perform light work as defined in 20 C.F.R. § 404.1567(b) that did not require lifting or carrying more than 10 pounds occasionally and less than 10 pounds frequently with the right dominant upper extremity, with no limitation with the left; that did not require more than occasional right-side overhead reaching; that did not require more than frequent reaching in other directions; that did not require more than frequent pushing, pulling, handling, fingering, or feeling with the right upper extremity, with no limits on the left upper extremity; that did not require climbing of ladders, ropes, or scaffolds; that did not require exposure

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<sup>1</sup> 20 C.F.R. § 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 to hazards such as open machinery or unprotected heights; that did not require  
2 exposure to heavy vibration; that did not require concentrated exposure to extreme  
3 cold; that did not require more than frequent balancing, stooping, crouching,  
4 kneeling, or climbing of ramps or stairs; that did not require crawling; that  
5 consisted of simple tasks; that consisted of routine tasks; and that did not require  
6 more than superficial interaction with others.

7 **Step four:** Through the date last insured, Mr. Hewitt was unable to perform any  
8 past relevant work.

9 **Step five:** Because jobs existed in significant numbers in the national economy  
10 that Mr. Hewitt could have performed through the date last insured, he was not  
11 disabled during the relevant period.

12 (*See id.* at 21-37.) The Appeals Council denied Mr. Hewitt's request for review, making  
13 the ALJ's decision the Commissioner's final decision.<sup>3</sup> (*See id.* at 1-7.)

### 14 III. ANALYSIS

15 Pursuant to 42 U.S.C. § 405(g), the court must set aside the Commissioner's  
16 denial of social security benefits if the ALJ's findings are based on legal error or not  
17 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
18 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
19 1999)).

#### 20 A. Evaluation of Mr. Hewitt's Testimony

21 Mr. Hewitt argues that the ALJ erred in evaluating his subjective complaints  
22 regarding the functionality of his right arm. (*See Op. Br.* at 9-10.) The court disagrees.

Questions of credibility are solely the responsibility of the ALJ. *See Sample v.*  
*Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The court may not second-guess these

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<sup>3</sup> The court omits the rest of the procedural history in this matter because it is not relevant to the outcome.

1 | credibility determinations. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). To reject  
2 | a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for  
3 | the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (internal citation  
4 | omitted). The ALJ "must identify what testimony is not credible and what evidence  
5 | undermines the claimant's complaints." *Id.*; see also *Dodrill v. Shalala*, 12 F.3d 915, 918  
6 | (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the  
7 | ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing."  
8 | *Lester*, 81 F.2d at 834.

9 |         Mr. Hewitt testified that in 2009 he could do "pretty much nothing" with his right  
10 | arm due to swelling and pain. (*See* AR at 90.) He stated that he could not lift 10 pounds  
11 | with his right arm or perform any fine manipulation. (*See id.*)

12 |         The ALJ discounted Mr. Hewitt's statements concerning the intensity and limiting  
13 | effects of his right-arm impairments because, among other reasons, the record showed  
14 | that Mr. Hewitt responded favorably to treatment during the relevant period. (*See id.* at  
15 | 28.) An ALJ may discount a claimant's testimony on the basis of medical improvement  
16 | and favorable response to treatment. See *Morgan v. Comm'r, Soc. Sec. Admin.*, 169 F.3d  
17 | 595, 599 (9th Cir. 1999); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008)  
18 | (stating that a favorable response to treatment "undermines [a claimant's] reports  
19 | regarding the disabling nature" of an impairment). Here, after a full recovery from  
20 | rotator cuff surgery that resulted in an intact repair, Mr. Hewitt complained of pain and  
21 | numbness in his right hand. (*See* AR at 542, 546.) Despite normal strength and reflex  
22 | test results, Mr. Hewitt underwent a carpal tunnel release on his right arm in January

1 2009. (*See id.* at 535, 624-25.) Mr. Hewitt then experienced improvement in his  
2 capabilities and stated that his numbness was gone. (*See id.* at 532-33.) Tests performed  
3 months after the date last insured revealed normal neurological findings and full arm  
4 strength with the exception of very mildly decreased grip strength on the right side. (*See*  
5 *id.* at 529-30.) Therefore, based on the medical record showing a favorable response to  
6 treatment, the ALJ had substantial evidence to find that Mr. Hewitt's right-arm  
7 impairment was not as severely limiting during the relevant period as Mr. Hewitt stated at  
8 the hearing.

9 **B. Evaluation of the Medical Evidence**

10 Mr. Hewitt also argues that the ALJ erred in evaluating the medical evidence in  
11 the record. (*See Op. Br.* at 5-8.) Where the medical evidence in the record is not  
12 conclusive, resolving questions of credibility and conflicts in the evidence is solely the  
13 responsibility of the ALJ. *See Sample*, 694 F.2d at 642. In resolving questions of  
14 credibility and conflicts in the evidence, an ALJ's findings "must be supported by  
15 specific, cogent reasons." *See Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The  
16 ALJ can satisfy this requirement "by setting out a detailed and thorough summary of the  
17 facts and conflicting clinical evidence, stating his interpretation thereof, and making  
18 findings." *Id.* The ALJ may also draw inferences "logically flowing from the evidence."  
19 *Sample*, 694 F.2d at 642. Further, the court itself may draw "specific and legitimate  
20 inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir.  
21 1989).

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1 The ALJ must provide “clear and convincing” reasons for rejecting the  
2 uncontradicted opinion of either a treating or examining physician. *Lester*, 81 F.3d at  
3 830. Even when a treating or examining physician’s opinion is contradicted, that opinion  
4 “can only be rejected for specific and legitimate reasons that are supported by substantial  
5 evidence in the record.” *Id.* at 830-31.

6 1. Ronald Kendrick, M.D.

7 Mr. Hewitt argues that the ALJ erred by failing either to fully incorporate or to  
8 give a specific and legitimate reason supported by substantial evidence to discount the  
9 opinion of medical expert Ronald Kendrick, M.D. (*See Op. Br.* at 5-7.) The court  
10 disagrees.

11 The ALJ gave Dr. Kendrick’s opinion significant weight and incorporated it into  
12 the RFC. (*See AR* at 23, 31.) Mr. Hewitt argues that the ALJ failed to incorporate Dr.  
13 Kendrick’s finding that Mr. Hewitt was limited to sedentary work. (*See Op. Br.* at 5-6.)  
14 However, the Dr. Kendrick only stated that Mr. Hewitt’s arm pain “would limit his  
15 ability to use the involuntary upper extremity for anything greater than sedentary work.”  
16 (*See AR* at 73.) The ALJ immediately clarified, and Dr. Kendrick confirmed, that Dr.  
17 Kendrick was referring to limitations in lifting and carrying, not standing or walking.  
18 (*See id.*) Accordingly, the ALJ limited Mr. Hewitt to light work with additional, more  
19 severe restrictions in lifting and carrying. (*See id.* at 23.) Mr. Hewitt shows no error in  
20 the ALJ’s evaluation of Dr. Kendrick’s opinion.

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1           2. Christopher Penoyar, D.O.

2           Mr. Hewitt argues that the ALJ erred by failing to give a specific and legitimate  
3 reason supported by substantial evidence to discount the opinion of treating physician  
4 Christopher Penoyar, D.O. (*See Op. Br. at 7-8.*) The court disagrees.

5           In March 2015, Dr. Penoyar completed a medical opinion form regarding Mr.  
6 Hewitt's functional capacity in March 2009. (*See AR at 710-11.*) In that form, Dr.  
7 Penoyar indicated that, among other limitations, Mr. Hewitt could stand or sit no more  
8 than two hours in a workday, could occasionally lift and carry no more than 10 pounds,  
9 could never twist, stoop, crouch, or climb stairs or ladders, and would need to change  
10 positions every 10 minutes and lie down four to six times per workday. (*See id.*) The  
11 ALJ gave Dr. Penoyar's opinion no weight because, among other reasons, Dr. Penoyar's  
12 treatment notes did not reflect the severity of limitations to which he opined. (*See id. at*  
13 *33.*)

14           A discrepancy between a medical opinion source's functional assessment and that  
15 source's clinical notes and recorded observations regarding a claimant's capabilities "is a  
16 clear and convincing reason for not relying" on the assessment. *Bayliss*, 427 F.3d at  
17 1216; *see also Weetman v. Sullivan*, 877 F.2d 20, 23 (9th Cir. 1989). Here, Dr. Penoyar's  
18 clinical notes from the relevant period mention right shoulder, arm, and wrist pain from  
19 carpal tunnel syndrome, occasional lymphadenopathy and recurrent sore throat, and other  
20 temporary ailments. (*See AR at 588-95.*) Nothing in Dr. Penoyar's clinical notes  
21 indicates that Mr. Hewitt was so severely impaired in 2009 that he could not even

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1 perform sedentary-level work. (*See id.*) Therefore, the ALJ provided a specific and  
2 legitimate reason supported by substantial evidence to discount Dr. Penoyar's opinion.

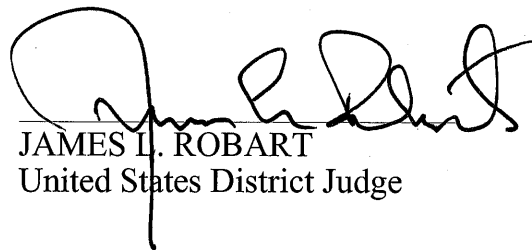
3 **C. The RFC Assessment and Step-Five Finding**

4 Mr. Hewitt argues that the RFC and step-five finding are not supported by  
5 substantial evidence due to the errors alleged above. (*See Op. Br.* at 10.) However,  
6 because the court finds that the ALJ did not err in evaluating Mr. Hewitt's testimony or  
7 the medical evidence, the RFC and step-five finding are supported by substantial  
8 evidence and not in error. *See supra* §§ III.A-B.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the court AFFIRMS the Commissioner's final decision  
11 and DISMISSES this case with prejudice.

12 Dated this 12<sup>th</sup> day of June, 2017.

13   
14 JAMES L. ROBART  
15 United States District Judge  
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