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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARILYN L. PRICE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 17-5149-BAT

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

Marilyn L. Price appeals the ALJ’s May 29, 2015, decision finding her not disabled. The ALJ found chronic fatigue syndrome, depressive disorder and adjustment disorder with anxious mood are severe impairments; Ms. Price can perform less than the full range of light work with additional mental and environmental limitations; and that she cannot perform past relevant work but can perform other work in the national economy. Tr. 25-37.

Ms. Price contends the ALJ misevaluated the medical evidence, her testimony and the lay testimony. She also contends the evidence she submitted to the Appeals Council undermines the ALJ’s disability determination. As relief, she asks the Court to reverse and remand the case for further proceedings. Dkt. 13 at 1, 18. For the reasons below, the Court **REVERSES** the Commissioner’s final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

1 **DISCUSSION**

2 **A. Evidence Presented to the Appeals Council**

3 After the ALJ issued the decision finding Ms. Price not disabled, Ms. Price requested
4 review in the Appeals Council. Tr. 8. In support of her request, she submitted a number of
5 medical records including a psychological evaluation performed on September 17, 2015, by
6 Kimberly Wheeler, Ph.D. Tr. 2. The Appeals Council made all of Ms. Price’s post-hearing
7 medical submissions part of the record except for Dr. Wheeler’s evaluation. *Id.* Ms. Price argues
8 the Appeals Council should have made Dr. Wheeler’s evaluation part of the record; she also
9 argues Dr. Wheeler’s evaluation undermines the ALJ’s determination that she is not disabled.
10 Dkt. 13 at 8-10.

11 As to Ms. Price’s first argument, the Commissioner contends Dr. Wheeler’s evaluation is
12 not part of the record and therefore the Court cannot consider it. Citing to *Brewes v. Comm’r of*
13 *Social Sec. Admin.*, 682 F3d 1157 (9th Cir. 2011), the Commissioner contends “the
14 administrative record includes evidence the Appeals Council considered.” Dkt. 14 at 6. In
15 support of this contention, the Commissioner argues under 20 C.F.R. §§ 404.970(b),
16 416.1470(b), the Appeals Council only “considers” evidence that relates to the period on or
17 before the date of the administrative hearing. *Id.* The Commissioner contends because the
18 Appeals Council stated Dr. Wheeler’s evaluation “is about a later time,” and “does not affect the
19 decision about whether you were disabled beginning on or before May 29, 2015,” the Appeals
20 Council did not “consider” the evaluation. *Id.* (referring to Tr. 2).

21 The argument fails. The Appeals Council may deny a party’s request for review or it
22 may decide to review a case. 20 C.F.R. §§ 404.967, 416.1467. Here, the Appeals Council denied
23 review. Tr. 1. The regulations the Commissioner relies upon—20 C.F.R. §§ 404.970(b) and

1 416.1470(b)— are titled “Cases the Appeals Council will review.” The title and plain language
2 of both sections make clear that these sections regard only the circumstances under which the
3 Appeals Council **will**, i.e., is required to, review a case. *Id.* But neither section applies to this
4 case, a case in which the Appeals Council received new evidence and **denied** review.

5 The Commissioner’s interpretation of “considered” is also inconsistent with the
6 regulatory scheme for requesting review. A claimant is entitled to file a written request for
7 Appeals Council review. 20 C.F.R. §§ 404.968(a), 416.1468. The regulations further state “[a]ny
8 documents or other evidence you wished to have **considered** by the Appeals Council should be
9 submitted with your request for review.” *Id.* (emphasis added). The regulations thus clearly
10 indicate the Appeals Council will **consider** evidence the claimant submits in support of a written
11 request for Appeals Council review.

12 Here, in denying review, the Appeals Council stated it “looked at” all of the medical
13 records Ms. Price submitted including Dr. Wheeler’s evaluation. Tr. 2. The record thus
14 establishes the Appeals Council “considered” all of this evidence, a conclusion supported by its
15 determination that Dr. Wheeler’s evaluation is “information about a later time.” The record
16 accordingly belies the Commissioner’s claim that the Appeals Council did not “consider” Dr.
17 Wheeler’s evaluation.

18 The Commissioner also argues the Court may not consider evidence the Appeals Council
19 “excludes” or does not make part of the administrative record. Dkt. 14 at 6. The Commissioner
20 argues under 42 U.S.C. § 405(g) the Commissioner has the sole authority to create and certify
21 the administrative record. Section 405(g) states “[a]s part of the Commissioner’s answer, the
22 Commissioner of Social Security shall file a certified copy of the transcript of the record.” This
23 section only directs the Commissioner to submit the complete administrative record, and to

1 certify that it is complete and accurate. But it contains nothing indicating the Commissioner can
2 pick and choose what evidence presented to the ALJ or Appeals Council makes it into the record
3 as the Commissioner implies.

4 In short, nether the law nor the record support the Commissioner's contentions that Dr.
5 Wheeler's evaluation is not part of the administrative record because the Appeals Council did not
6 "consider" it, and because § 405(g) grants the Commissioner carte blanche to pick and choose
7 what evidence makes it into the record. The record clearly establishes Dr. Wheeler's evaluation
8 was submitted and considered by the Appeals Council in denying review. Because the Appeals
9 Council considered the evaluation, the Court may also consider it. *Lingenfelter v. Astrue*, 504
10 F.3d 1028, 1030 n. 2 (9th Cir. 2007). *See also Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir.
11 2000) ("We properly may consider the additional materials because the Appeals Council
12 addressed them in the context of denying Appellant's request for review.")"

13 As the Court may consider, Dr. Wheeler's evaluation, the Court turns to Ms. Price's
14 second argument: that the Court should remand the case because the evaluation undermines the
15 ALJ's disability determination. The Commissioner does not analyze whether Dr. Wheeler's
16 evaluation undermines the ALJ's disability determination. Dkt. 14 at 4-5. Although the
17 Commissioner's lack of discussion amounts to a concession, the Court has reviewed Dr.
18 Wheeler's evaluation and concludes the ALJ's disability determination is not supported by
19 substantial evidence.

20 Dr. Wheeler performed a Department of Social and Health Services psychological
21 examination about four months after the ALJ issued her decision. Dkt. 13 (Appendix 1). The
22 doctor diagnosed Ms. Wheeler with depression and generalized anxiety. These are not new
23 disorders that popped up after the ALJ issued her decision, but are disorders that are consistent

1 with the ALJ's determination that depressive disorder and adjustment disorder with anxious
2 mood are severe impairments. Dr. Wheeler's clinical interview also indicates the doctor
3 evaluation was not a snap-shot limited only to the date of the evaluation. Rather Dr. Wheeler,
4 outlined Ms. Price's history from childhood and how she began having problems starting in
5 2009. Dr. Wheeler opined Ms. Price was markedly limited in her ability to adapt to changes in a
6 routine work setting; communicate and perform effectively in a work setting; and complete a
7 normal work day and work week without interruptions from psychologically based symptoms.
8 *Id.* at 3. The doctor also opined Ms. Price was moderately limited in her ability to understand,
9 remember, and persist in tasks following very short and simple instructions; perform activities
10 within a schedule, and maintain regular attendance; learn new task; and maintain appropriate
11 behavior in the work setting. *Id.* As the ALJ's RFC determination does not account for these
12 limitations, the ALJ's disability determination is not supported by substantial evidence, and the
13 matter must be remanded for further proceedings.

14 **B. Medical Evidence**

15 Ms. Price's opening brief lists, seriatim, notations made by 19 medical sources. Dkt. 13
16 2-8. Ms. Price claims the medical evidence is consistent with her testimony and confirms there
17 is an objective basis for her limitations. *Id.* at 8. The Court rejects this sweeping and conclusory
18 statement. Ms. Price cannot merely make a statement and leave the Court to do counsel's work—
19 framing the argument, and putting flesh on its bones through a discussion of the applicable law
20 and facts. *See Ve Thi Nguyen v. Colvin*, No. C13-882 RAJ-BAT, 2014 WL 1871054 at * 2 (W.D.
21 Wash., May 8, 2014) (unpublished) *citing Vandenoorn v. Barnhart*, 421 F.3d 745, 750 (8th Cir.
22 2005) (rejecting out of hand conclusory assertion that ALJ failed to consider whether claimant
23 met Listings because claimant provided no analysis of relevant law or facts regarding Listings);

1 *Perez v. Barnhart*, 415 F.3d 457, 462 n. 4 (5th Cir. 2005) (argument waived by inadequate
2 briefing); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n. 2 (10th Cir. 1994) (perfunctory complaint
3 fails to frame and develop issue sufficiently to invoke appellate review).

4 Although Ms. Price has waived argument on most of the 19 medical sources she listed in
5 her opening brief, the Court notes she presented some argument regarding the ALJ's assessment
6 of the opinions of W. Daniel Davenport, M.D., Kathleen Mayers, Ph.D., Patricia Geist, and Leah
7 Uy, M.D. Argument thus is not waived as to these sources. These sources all rendered opinions
8 touching on Ms. Price's mental health limitations. Because the ALJ must reassess Ms. Price's
9 mental limitations, on remand, based upon the impact of Dr. Wheeler's new opinion and any
10 further development of the record the ALJ must necessarily reassess these sources' opinions.

11 **C. Ms. Price's Testimony**

12 The ALJ did not find Ms. Price was malingering and therefore must provide specific,
13 clear and convincing reasons to reject her testimony. *Smolen v. Chater*, 80 F.3d 1273, 1283-84
14 (9th Cir. 1996). The Commissioner argues and the Court agrees the ALJ gave at least one valid
15 reason to discount Ms. Price's testimony: that Ms. Price's testimony is inconsistent with the
16 medical evidence. Tr. 29-33. The ALJ detailed a number of inconsistencies that Ms. Price does
17 not specifically refute. Dkt 13 at 12. At most Ms. Price listed selected portions of the medical
18 evidence, as noted above. But she makes no effort in her opening brief to articulate how or why
19 the ALJ's finding that the medical evidence contradicts her testimony is not supported by
20 substantial evidence. The Court reviews whether the ALJ's decision contains legal errors or is
21 not supported by substantial evidence, not the claimant's views of the evidence.

22 In her reply, Ms. Price contends the medical evidence does not contradict her testimony.
23 Ms. Price argues the ALJ erred in relying on Dr. Davenport's opinion that she had no limitation

1 in her standing, walking or sitting capacities. Dkt. 15 at 6. Ms. Price argues this is an **opinion** not
2 a **finding**, and therefore not something that contradicts her testimony. The Court rejects this
3 distinction. The ALJ may consider “ordinary techniques of credibility evaluation” including
4 inconsistencies between the claimant’s testimony and testimony from doctors concerning the
5 nature, severity, and effect of the symptoms of which claimant complains. *Smolen v. Chater*, 80
6 F.3d 1273, 1284 (9th Cir. 1996). The ALJ appropriately relied upon the inconsistencies between
7 Dr. Davenport’s opinions about Ms. Price’s limitations and Ms. Price’s testimony about the
8 severity of her limitations. The Court accordingly affirms the ALJ’s determination regarding Ms.
9 Price’s testimony.

10 **D. Lay Testimony**

11 Ms. Price contends the ALJ misevaluated the lay testimony of Donna Heitzman, Donna
12 Huntting, and L. Jackson, a SSA interviewer. Dkt. 13 at 14-16.

13 Ms. Price argues the ALJ erred in failing to discuss Ms. Jackson’s comment that Ms.
14 Price looked very tired during an interview, and appeared to have a loss of energy. Dkt. 13 at 14.
15 The ALJ errs if he or she does not explain why significant, probative evidence is rejected.
16 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). The ALJ did not mention Ms. Jackson.
17 However, Ms. Price fails show how this amounts to harmful error. Ms. Jackson provided a one-
18 time observation but little in the way of the degree of Ms. Price’s functional limitations, and
19 whether she was capable of performing work. Ms. Price does not articulate how the ALJ’s failure
20 to comment on Ms. Jackson’s comment results in a harmful omission of a functional limitation
21 bearing on her RFC. She thus fails to show the ALJ harmfully erred and the Court rejects her
22 contention.

1 As to Ms. Heitzman and Ms. Huntting, the ALJ found their testimony largely reiterated
2 Ms. Price's testimony about her limitations. Tr. 29. The ALJ rejected these witnesses' testimony
3 finding their statements, like Ms. Price's, is inconsistent with the medical evidence. Tr. 35.
4 Where lay witness testimony does not describe any limitations not already described by the
5 claimant, and the ALJ's well-supported reasons for rejecting the claimant's testimony apply
6 equally well to the lay witness testimony. *See Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012).
7 As discussed above, the ALJ properly discounted Ms. Price's testimony as inconsistent with the
8 medical evidence. The ALJ accordingly did not err in rejecting Ms. Heitzman's and Ms.
9 Huntting's testimony.

10 CONCLUSION

11 The Courts **REVERSES** the Commissioner's final decision and **REMANDS** the case for
12 further administrative proceedings under sentence four of 42 U.S.C. § 405(g). On remand, the
13 ALJ shall assess Dr. Wheeler's evaluation; develop the record as needed; and reassess the
14 opinions of W. Daniel Davenport, M.D., Kathleen Mayers, Ph.D., Patricia Geist, and Leah Uy,
15 M.D. in light of Dr. Wheeler's evaluation and record development. The assessment of these
16 opinions and potential development of the record may make it appropriate for the ALJ to
17 reassess the lay testimony and Ms. Price's testimony. As appropriate the ALJ shall reassess Ms.
18 Price's RFC and proceed to step five.

19 DATED this 18th day of October, 2017.

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22 BRIAN A. TSUCHIDA
United States Magistrate Judge

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