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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

7 MICHAEL JOHN MIDLAM,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Deputy
11 Commissioner of Social Security for Operations,

12 Defendant.

Case No. C17-5650 JCC

**ORDER REVERSING AND
REMANDING THE CASE FOR
FURTHER ADMINISTRATIVE
PROCEEDINGS**

13 Plaintiff, Michael John Midlam, seeks review of the denial of his October 25, 2013,
14 application for Supplemental Insurance Security Income. Dkt. 1. Plaintiff contends the ALJ
15 harmfully erred by failing to account for all limitations assessed by Thomas Clifford, Ph.D.,
16 Andrew Forsyth, Ph.D., Wendy Hartinger, Psy.D., and Wendi Wachsmuth, Ph.D., and by failing
17 to provide clear and convincing reasons to reject plaintiff's testimony. Dkt. 7 at 1-2. As relief,
18 plaintiff contends the Court should reverse the ALJ's decision and remand the case for
19 calculation of an award of benefits. *Id.*

20 The Commissioner disagrees, arguing the ALJ properly weighed the medical evidence
21 and provided valid reasons to discount plaintiff's testimony. Dkt. 11. As discussed below, the
22 Court finds the ALJ harmfully erred and **REVERSES** the Commissioner's final decision. The
23 Court finds there are outstanding issues to resolve and accordingly **REMANDS** the matter for

ORDER REVERSING AND REMANDING
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ADMINISTRATIVE PROCEEDINGS - 1

1 further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

2 THE ALJ'S DECISION

3 Using the five-step disability evaluation process set forth in 20 C.F.R. § 416.920, the ALJ
4 found:

5 **Step one:** Plaintiff has not engaged in substantial gainful activity since October 25,
6 2013.

7 **Step two:** Affective disorder, and human immunodeficiency virus (HIV) are severe
8 impairments.

9 **Step three:** These impairments do not meet or equal the requirements of a listed
10 impairment. *See* 20 C.F.R. Part 404, Subpart P. Appendix 1.

11 **Residual Functional Capacity:** Plaintiff can perform work at all exertional levels with
12 the following non-exertional limitations: he can only occasionally climb ladders, ropes,
13 scaffolds and have occasional exposure to hazards such as unprotected heights and
14 moving mechanical parts. He is capable of simple, routine and repetitive tasks with
15 simple work-related decisions. He is limited to only occasional interaction with
16 supervisors and coworkers and no interaction with the public.

17 **Step four:** Plaintiff can perform past relevant work as a laborer/assembler-production
18 line.

19 **Step five:** Alternatively, plaintiff can perform other jobs that exist in significant numbers
20 in the national economy and is therefore not disabled.

21 Tr. 23-37. The ALJ's decision is the Commissioner's final decision because the Appeals Council
22 denied plaintiff's request for review. Tr. 1. The rest of the procedural history is not essential in
23 determining the outcome of the case and is thus not recounted.

24 DISCUSSION

25 The Commissioner's determination that a claimant is not disabled will be upheld if the
26 findings of fact are supported by substantial evidence in the record as a whole and the proper
27 legal standards were applied. *Schneider v. Comm'r of SSA*, 223 F.3d 968, 973 (9th Cir. 2000).

28 A. The ALJ's Evaluation of the Medical Evidence

1 Plaintiff challenges the ALJ’s evaluation of the opinions of Thomas Clifford, Ph.D.,
2 Andrew Forsyth, Ph.D., Wendy Hartinger, Psy.D., and Wendi Wachsmuth, Ph.D. The ALJ must
3 give clear and convincing reasons to reject uncontradicted medical opinions and specific and
4 legitimate reasons to reject contradicted medical opinions. *Lester v. Chater*, 81 F.3d 821, 830-31
5 (9th Cir. 1996).

6 ***I. Drs. Clifford and Forsyth***

7 The ALJ noted that agency reviewing doctors Thomas Clifford, Ph.D., and Andrew
8 Forsyth, Ph.D., opined plaintiff “would do best if not working in close proximity to others,” and
9 “can do jobs requiring no more than superficial interaction with others.” Tr. 32. The ALJ gave
10 “great weight” to these opinions on the grounds they are consistent with the record, and stated
11 the opinions “support[] the residual functional capacity assessment set forth in this decision.” *Id.*
12 Plaintiff contends the ALJ erred because the RFC determination fails to account for the
13 limitations the doctors assessed. The Court agrees.

14 The ALJ determined plaintiff has the RFC to perform jobs with occasional interaction
15 with supervisors and coworkers and no interaction with the public. This RFC does not account
16 for the limitations assessed by Drs. Clifford and Forsyth. Occasional contact measures the
17 frequency with which one comes into contact with another. It does not measure depth of contact,
18 meaning whether the contact is superficial or not. Further, occasional contact does not measure
19 proximity, meaning how close or far apart one performs work in relation to others. For instance,
20 a job might require a worker to work in very close proximity to other workers even though it
21 does not contemplate more than occasional co-worker interaction.

22 The Commissioner argues the RFC determination here includes no contact with the
23 public and that this limitation accounts for all of the limitations the doctors assessed. But the fact

1 that one's work involves no contact with the public does not shield one from working in close
2 proximity to the public. In short, the ALJ erred in that the limitations regarding proximity and
3 depth of contact are not accounted for in the RFC determination.

4 The Court notes and rejects the Commissioner's arguments that the ALJ's RFC
5 determination reflects how the ALJ "synthesized" the opinions of three agency reviewing
6 doctors: Drs. Clifford and Forsyth, and Jan Lewis, Ph.D. Dkt. 11 at 3. The ALJ's decision does
7 not contain such an analysis and the Commissioner's contention is thus an improper post hoc
8 argument upon which the Court cannot rely. The Court reviews the ALJ's decision "based on
9 the reasoning and findings offered by the ALJ—not *post hoc* rationalizations that attempt to
10 intuit what the adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219,
11 1225 (9th Cir. 1995). In any event, the decision does not show that this is what the ALJ did.

12 Rather, the decision reveals the ALJ rejected Dr. Lewis' opinion that plaintiff has no
13 social limitations on the grounds it "underestimates the impact of claimant's mental impairments
14 on his social interaction, and is not consistent with the record as a whole." Tr. 32. Given this
15 rejection there was nothing for the ALJ to synthesize. Instead of synthesizing, the ALJ adopted
16 the limitations found by Drs. Clifford and Forsyth but, as discussed above, erred in failing to
17 account for them in the RFC determination.

18 Similarly the Court rejects the Commissioner's argument that the doctors did not set forth
19 a functional limitation because they found plaintiff would do best if not working in close
20 proximity to others. Dkt. 11 at 3. According to the Commissioner this is a recommendation, not
21 a functional limitation. *Id.* This is not just a *post hoc* explanation of the ALJ's determination but
22 one that is contrary to what the ALJ found. The ALJ did not find the proximity limitation was
23 merely a recommendation that need not be accounted for. If the ALJ had, she would have said

1 so and rejected the limitation. Instead the ALJ, without qualification, gave Drs. Clifford's and
2 Forsyth's opinions great weight and tied their opinions, albeit erroneously, to the RFC
3 determination.

4 In sum, the ALJ erred in failing to account for limitations assessed by the doctors. The
5 error is not harmless because in assessing a claimant's residual functional capacity, the ALJ must
6 consider the limitations and restrictions caused by the claimant's medically determinable
7 impairments, including any related symptoms. SSR 96-8p; 20 C.F.R. § 404.1545(a)(2). As this
8 did not occur, the matter must be remanded for further administrative proceedings.

9 **2. Dr. Hartinger**

10 In July 2015, Dr. Hartinger completed a psychological evaluation. Tr. 679-83. Dr.
11 Hartinger opined plaintiff had numerous limitations that were moderate or marked. Tr. 681. The
12 ALJ accepted the moderate limitations but rejected the marked functional limitations assessed by
13 Dr. Hartinger on the grounds that "[t]hese ratings overstate claimant's limitations in a manner
14 that is not consistent with his record of only conservative treatment, and are not consistent with
15 the overall record (e.g. regular psychiatric screenings within normal)." Tr. 35. The Court
16 concludes that inconsistency with the medical record is a specific and legitimate reason,
17 supported by substantial evidence in the record, to discount Dr. Hartinger's opined marked
18 limitations. Inclusion of other, erroneous reasons was harmless error.

19 Plaintiff argues that the ALJ's reasoning is conclusory. Dkt. 7 at 6. But looking at the
20 ALJ's decision as a whole, the ALJ makes clear that the overall record supports moderate, not
21 marked or severe, limitations. The ALJ discusses several examining and nonexamining medical
22 source opinions and concludes that "mild to moderate limitations, and the capacity to perform
23 unskilled work ... is generally consistent with the record as a whole." Tr. 33. Plaintiff does not

1 challenge the ALJ's assessment of this evidence. The ALJ's finding that mental status
2 screenings did not reflect "debilitating" limitations was also supported by substantial evidence.
3 Tr. 29. Psychiatric screenings showed multiple mild deficits, but nothing more severe than that.
4 Tr. 384-85 (mild deficits in immediate memory, fund of knowledge, attention/concentration,
5 abstract abilities, judgment and insight). The mental status exam Dr. Hartinger performed also
6 showed generally mild results. Tr. 682-83 (dysthymic mood, impairments in memory, abstract
7 thinking, insight and judgment). "An ALJ may reject an examining physician's opinion if it is
8 contradicted by clinical evidence." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1199 (9th Cir.
9 2008). Inconsistency with the medical record was thus a legally sufficient reason for the ALJ to
10 discount Dr. Hartinger's more severe limitations.

11 The prior treatment plaintiff received is not a specific and legitimate reason to discount
12 Dr. Hartinger's opinions, however, because plaintiff appears to have no money and no medical
13 insurance, limiting his access to treatment and medications. Tr. 395, 690 (plaintiff is
14 "unemployed, lacks adequate social support, [has] inadequate access to health care, inadequate
15 finances, legal involvement"). The ALJ did not discuss whether any of these factors, which
16 clearly relate to plaintiff's treatment history, rationally explain the paucity of treatment. This is
17 thus not a case in which plaintiff had the resources to avail himself of treatment but did not. The
18 ALJ accordingly erred in relying on the limited treatment plaintiff received as a basis to reject
19 Dr. Hartinger's opinions.

20 However, the error is harmless, because inconsistency with the medical record was a
21 specific and legitimate reason, supported by substantial evidence, to discount Dr. Hartinger's
22 opinions. The Court concludes the ALJ did not err.

23 **3. *Dr. Wachsmuth***

1 In September 2013, Dr. Wachsmuth completed a psychological examination and opined
2 plaintiff had functional limitations ranging from moderate to severe. Tr. 691. The ALJ accepted
3 the moderate limitations but rejected the marked and severe limitations in Dr. Wachsmuth's
4 opinions on the grounds that she provided "minimal objective evidence to support the degree of
5 severity and the ratings appear to rely largely on claimant's self-report." Tr. 34. The ALJ also
6 discounted the more severe limitations as not consistent with the record as a whole. *Id.*

7 Generally if a medical source's opinions are based "to a large extent" on a claimant's
8 self-reports and not on clinical evidence, and the ALJ finds the claimant not credible, the ALJ
9 may discount the source's opinion. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).
10 However, when an opinion is not more heavily based on a patient's self-reports than on clinical
11 observations, there is no evidentiary basis for rejecting the opinion. *Ghanim v. Colvin*, 763 F.3d
12 1154, 1162 (9th Cir. 2014). Additionally, an ALJ does not provide clear and convincing reasons
13 for rejecting an examining doctor's opinion by questioning the credibility of the patient's
14 complaints where the doctor does not discredit those complaints and supports her ultimate
15 opinion with her own observations. *Ryan*, 528 F.3d at 1199–1200 (citing *Edlund v. Massanari*,
16 253 F.3d 1152, 1159 (9th Cir. 2001)).

17 Here, Dr. Wachsmuth did question the sincerity of plaintiff's complaints, finding that
18 plaintiff "either could or would not attempt to answer [mental status examination] questions" and
19 she was "uncertain if this was attributable to symptoms or attitude." Tr. 692. And the ALJ
20 permissibly discounted plaintiff's credibility, as discussed below. Tr. 28, 30. It is true that
21 psychiatric evaluations "will always depend in part on the patient's self-report, as well as on the
22 clinician's observations of the patient." *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).
23 But because plaintiff's credibility was permissibly discounted and Dr. Wachsmuth herself

1 questioned the credibility of plaintiff's responses to mental status examination questions, the
2 ALJ did not err in discounting the opinions that relied on those responses.

3 Additionally, the ALJ's discounting of Dr. Wachsmuth's more severe limitations as
4 inconsistent with the record as a whole is also supported by substantial evidence. Tr. 34. As
5 discussed above, the ALJ's finding that the record as a whole supports no more than moderate
6 limitations is supported by substantial evidence.

7 The Court notes the ALJ also rejected the doctor's opinions for the same erroneous
8 reason she rejected Dr. Hartinger's opinions: that the opinions are inconsistent with a record of
9 conservative treatment. Tr. 34. In addition, the ALJ erred in rejecting Dr. Wachsmuth's
10 opinions on the grounds that they conflicted with plaintiff's range of activities. Tr. 34. The ALJ
11 does not explain how activities such as doing simple household chores, for example, are
12 inconsistent with limitations on activities such as completing a normal work day and work week.
13 Tr. 30, 691. The errors are harmless, however, because the ALJ provided at least one specific
14 and legitimate reason, supported by substantial evidence, to discount the opinions.

15 The Court concludes the ALJ did not err in rejecting the marked and severe limitations in
16 Dr. Wachsmuth's opinions.

17 **B. The ALJ's Evaluation of Plaintiff's Testimony**

18 Plaintiff contends the ALJ erred in rejecting his testimony. In evaluating the effect of
19 pain and other subjective symptoms on a claimant's residual functional capacity, an ALJ must
20 first determine whether the claimant's medically determinable impairments could reasonably be
21 expected to produce the alleged symptoms. *See* 20 C.F.R. § 404.1529. If so, the ALJ must next
22 evaluate the intensity, persistence, and limiting effects of the symptoms to determine the extent
23 to which they limit the claimant's capacity for work. *See id.*

1 If there is no evidence of malingering, the ALJ may reject the claimant’s testimony about
2 the severity of the symptoms only by making specific findings stating clear and convincing
3 reasons for doing so. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). The ALJ may
4 consider “ordinary techniques of credibility evaluation” including the claimant’s reputation for
5 truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities,
6 work record, and testimony from physicians and third parties concerning the nature, severity, and
7 effect of the symptoms of which claimant complains. *Id.* at 1284.

8 Malingering alone is a legally sufficient reason to discount testimony. The “clear and
9 convincing ... standard does not apply ... when there is affirmative evidence that the claimant is
10 malingering.” *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008); *see*
11 *also Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1040–41 (9th Cir. 2003) (ALJ may reject
12 claimant’s testimony “upon (1) finding evidence of malingering, *or* (2) expressing clear and
13 convincing reasons” (emphasis added)). Plaintiff does not dispute that several providers
14 diagnosed malingering. Tr. 302 (“gross exaggeration”), 305 (“Malingering”), 482
15 (“Malingering”; “fabricated” effort). This affirmative evidence was legally sufficient, and the
16 ALJ did not err in discounting plaintiff’s testimony due to malingering. *See* Tr. 31.

17 In addition, the ALJ gave at least one clear and convincing reason supported by
18 substantial evidence to discount plaintiff’s testimony. The ALJ found plaintiff’s testimony at the
19 hearing the ALJ conducted stood in “marked contrast” to statements plaintiff made earlier about
20 his functioning. Tr. 30. The ALJ noted plaintiff testified he spent most of his time in bed,
21 constantly needs someone at his side to assist him, and does no household chores, no cooking, no
22 shopping, no reading, and no socializing. Tr. 30-31. The ALJ found this testimony was
23 markedly different from earlier statements plaintiff made in which he indicated he attends to his

1 own self-care, makes his own meals, does chores, goes the store and runs errands, uses the
2 computers, plays video games, and golfs, though not regularly. Tr. 31. The ALJ also noted the
3 medical record did not document a sharp decline in plaintiff's condition between the time he
4 made his earlier statements and the time he testified before the ALJ. As such the ALJ concluded
5 that the restriction in his activities was voluntary and not due to his impairments. *Id.*

6 Plaintiff does not directly challenge the ALJ's rationale, *see* Dkt. 7 at 12-14, and thus
7 fails to meet his burden to establish the ALJ harmfully erred. *See Molina v. Astrue*, 674 F.3d
8 1104, 1111 (9th Cir. 2012) (burden of showing an error is harmful normally falls upon the party
9 attacking the agency's determination). Even if the Court looks past this failure and assesses the
10 ALJ's rationale, the Court cannot say the ALJ's determination is unreasonable. The record
11 shows plaintiff made markedly different statements about his activity level. As the ALJ may
12 consider inconsistencies in a claimant's testimony is assessing what weight it should be given,
13 the ALJ's reason is clear, convincing, and supported by substantial evidence. While plaintiff
14 argues that his activities do not show an ability to maintain competitive work activity, the
15 argument is unavailing. "Plaintiff overlooks the distinction between citing daily activities as
16 evidence of work capabilities, and citing daily activities as inconsistent with other testimony."
17 *Hunt v. Colvin*, 954 F.Supp.2d 1181, 1194 (W.D. Wash. 2013) (citing *Molina*, 674 F.3d at 1112-
18 13. Inconsistency with prior statements is a valid reason to discount plaintiff's testimony.

19 The ALJ gave other reasons to reject plaintiff's testimony which the Court need not
20 discuss. Even if the Court were to assume the ALJ erred in relying on the other reasons, the
21 error would be harmless. *See Carmickle*, 533 F.3d at 1162 (including an erroneous reason
22 among other reasons to discount a claimant's credibility does not negate the validity of the
23 overall credibility determination and is at most harmless error where an ALJ provides other

1 reasons that are supported by substantial evidence). In sum, the Court affirms the ALJ's
2 assessment of plaintiff's testimony.

3 **C. Scope of Remand**

4 Plaintiff contends the Court should remand the case for calculation of an award of
5 benefits. Only in rare circumstances should the Court remand a case for benefits. *See Treichler*
6 *v. Colvin*, 775 F3d 1090, 1099 (9th Cir. 2014). Where the record is fully developed and
7 additional proceedings would serve no useful purpose; the ALJ failed to provide legally
8 sufficient reasons for rejecting evidence; and if the improperly discredited evidence were
9 credited as true, the claimant would be disabled, the Court abuses its discretion by remanding for
10 further proceedings where the record provides no reason to believe the claimant is not in fact
11 disabled. *See Garrison v. Colvin*, 759 F3d 995, 1020, 1023 (9th Cir. 2014).

12 Here the further administrative proceedings would not only be useful but are necessary.
13 If the RFC determination is altered in light of the full limitations assessed by Drs. Clifford and
14 Forsyth, it still must be determined whether there are any jobs plaintiff can perform. That is a
15 determination that requires additional input from a vocational expert. Accordingly, because
16 plaintiff's entitlement to benefits is not clear, and the record must be developed further, the Court
17 remands the case for further administrative proceedings.

18 **CONCLUSION**

19 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this
20 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
21 405(g). On remand, the ALJ shall reassess the opinions of Drs. Clifford and Forsyth,
22 reformulate plaintiff's RFC as needed and proceed to steps four and five as appropriate.

1 DATED this 12th day of June, 2018.

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3 A handwritten signature in black ink, appearing to read "John C. Coughenour". The signature is written in a cursive style with a large initial "J".

4 John C. Coughenour
5 UNITED STATES DISTRICT JUDGE

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