

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MICHAEL R. SCHOW,

Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE,** Commissioner
of Social Security Administration,

Defendant - Appellee.

No. 05-35973

D.C. No. CV-04-00732-KI

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted December 3, 2007***
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and CALLAHAN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael J. Astrue is substituted for his predecessor Jo Anne Barnhart as Commissioner of the Social Security Administration. *See* Fed. R. App. P. 43(c)(2).

*** Appellant's counsel was unable to attend oral argument due to a medical emergency, and did not request a continuance. The court only heard argument from Appellee's counsel.

Michael R. Schow appeals the district court's decision upholding the Social Security Administration Commissioner's denial of Schow's application for Supplemental Security Income benefits. We reverse the district court and remand this matter for further proceedings. The parties are familiar with the factual and procedural history of this case, so we do not repeat it here.

The court reviews de novo the district court's order affirming the administrative law judge's ("ALJ") denial of social security benefits. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The court will disturb the denial of benefits only if the decision "contains legal error or is not supported by substantial evidence." *Id.*

1. The ALJ Correctly Rejected Five of Schow's Claimed Errors.

We hold that five of Schow's objections are not persuasive. First, the ALJ provided clear and convincing reasons for rejecting Dr. Colistro's medical opinion regarding Schow's purported mental impairments. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (holding that an "ALJ must provide clear and convincing reasons for rejecting an examining physician's uncontradicted medical opinion). The ALJ properly concluded that Dr. Colistro's opinion was "not supported by the treatment record," evidenced by facts including that Schow denied having any mental impairment; did not seek treatment for depression or mental health

counseling; had only “mild limitations in activities of daily living, social functioning, or concentration, persistence or pace”; and had no extended decompensation episodes.

Second, we find that any error in evaluating Drs. Sibell and Siddiqui’s diagnosis regarding myofascial dysfunction, and Dr. Krueger’s assessment of chronic pain syndrome, was harmless. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (stating that error is harmless if it is inconsequential to the ultimate determination). While the ALJ did not discuss these diagnoses by name, and thus did not provide clear and convincing reasons for rejecting them, *Lester*, 81 F.3d at 830, the ALJ actually considered the reported physical effects of these conditions in arriving at the disability determination.

Third, the record supports the ALJ’s determination that Schow’s myofascial dysfunction, depression, obsessive-compulsive tendencies, and somatic preoccupation were not severe. Schow failed to meet his burden of proving that these conditions significantly limited his physical or mental ability to do basic work activities. 20 C.F.R. §§ 416.912, 416.921; *Thomas v. Barnhart*, 278 F.3d 947, 954-55 (9th Cir. 2002). The ALJ’s decision is reasonably based on his rejection of Dr. Colistro’s medical opinion, Schow’s repeated denials of depression, and his decision not to seek treatment. Moreover, Schow did not raise

mental impairments in his initial benefits claim or his request for reconsideration. Additionally, Schow offered no evidence of myofascial dysfunction and chronic pain syndrome aside from the brief reports from Drs. Siddiqui, Sibell, and Krueger, which, in any event, the ALJ considered.

Fourth, the ALJ did not improperly reject the non-examining physician opinions from the Disability Determination Services consultants, Drs. Pritchard and McDonald. We find that the ALJ properly treated these non-examining physicians' opinions as opinion evidence and explained that they were entitled to "significant weight." 20 C.F.R. § 416.927(f)(2).¹

Fifth, the ALJ adequately explained his reasons for giving "little weight" to the opinion of Thanh Nguyen, a nurse practitioner. An ALJ may consider opinions from sources other than "acceptable medical sources," like a nurse practitioner, 20 C.F.R. § 416.913(d)(1), and may discount those opinions by providing reasons that are "germane" to that source. *Cf. Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (stating that inconsistency with medical evidence is a proper reason to discount an opinion); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)

¹ Schow overstates Dr. McDonald's assessment that Schow "had limited ability to reach in all directions." The record reflects that Dr. McDonald's opinion was limited to "[n]o constant overhead reaching," and the ALJ adequately accounted for the other limitations set forth in the opinions.

(addressing the discounting of lay witness testimony). The ALJ stated that Nguyen was not an “acceptable medical source” and cited inconsistencies between her opinion and the medical record.²

2. The ALJ’s Decision Must Be Reversed and Remanded Because of Three Remaining Errors.

We determine, however, that three of Schow’s objections are well taken and require that the matter be reversed and remanded. First, the ALJ did not provide “clear and convincing” reasons for rejecting Schow’s subjective pain and physical limitation testimony. Such reasons were required because Schow provided objective evidence of his degenerative disc disease and the ALJ made no finding of malingering. *See Robbins*, 466 F.3d at 883 (holding that “unless an ALJ makes a finding of malingering based on affirmative evidence thereof, he or she may only find an applicant not credible by making specific findings as to credibility and stating clear and convincing reasons for each.”) (citing *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996)). Credibility findings must be “sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas*, 278 F.3d at 958.

² Schow correctly argues that the ALJ misread Nguyen’s opinion to reflect that Schow spent 20 hours a day lying down. However, this error was harmless because the ALJ ultimately adopted Nguyen’s opinion that Schow could spend two hours of an eight-hour workday sitting and two hours standing or walking.

The dissent argues that our holding from *Robbins*, which requires that an ALJ provide clear and convincing reasons for an adverse credibility finding unless he makes a “finding of malingering based on affirmative evidence thereof,” 466 F.3d at 883, is anomalous in that the weight of our cases hold that the mere existence of “affirmative evidence suggesting” malingering vitiates the clear and convincing standard of review. Although the dissent is correct in its assessment of our case law, we find that the record does not contain “affirmative evidence suggesting” that Schow was malingering, and, therefore, the ALJ was still required to support his credibility finding with clear and convincing reasons. The dissent points to “affirmative evidence” consisting of “[t]hree separate medical tests between March 2000 and April 2001” that showed “unremarkable” or normal results, and a fourth examination conducted by nurse practitioner Ramirez-Williams on March 21, 2000. Dissent at 3. Any reliance on Ramirez-Williams’s findings is immediately suspect because the ALJ found that he was not an “acceptable” medical source and gave his opinions “little weight.” It would be inconsistent to both credit Ramirez-Williams’s intimation that Schow was a malingerer and reject Nguyen’s express opinion that Schow was not a malingerer when the ALJ rejected both of these nurses’ opinions for the same reasons. Likewise, the April 11, 2001 medical visit does not provide reliable support for the

dissent's position because that visit was with nurse Nguyen, whose opinion was properly rejected by the ALJ and who expressly opined that Schow was not a malingerer. Further, despite the fact that x-rays taken during a March 3, 2000 visit with Dr. Berselli were "unremarkable," Dr. Berselli did find Schow's symptoms legitimate enough to order an MRI because Schow "may well have a cervical disc herniation." The final piece of affirmative evidence would seemingly come from a December 15, 2000 neurosurgical consultation, which lasted 15 minutes, indicating good range of motion of the neck and resulting in an MRI finding of a mild bone spur "but nothing really remarkable causing spinal cord compression or nerve root compression." The findings from this brief examination are mixed at best and, by themselves, do not constitute affirmative evidence of malingering.

The ALJ provided eight reasons for his adverse credibility finding, which we must analyze under the clear and convincing standard. At least five of these reasons do not support the credibility finding. The record does not support the ALJ's reasons regarding Schow's alleged failure to report numbness to his physicians and the closeness in time of Schow's incarceration and work stoppage. Likewise, the record does not support the existence of a treatment gap, and the ALJ improperly penalized Schow for his insurance company's refusal to cover therapy during that purported treatment gap. *See Orn*, 495 F.3d at 638 (inability to pay

adequately explains a treatment gap). Further, the ALJ improperly questioned Schow's credibility based on his failure to provide objective evidence of his rest needs. *See Robbins*, 466 F.3d at 883 (ALJ may not reject testimony as incredible "solely because it is not substantiated affirmatively by objective medical evidence"). Finally, the ALJ overstated Schow's ability to carry on daily activities. *See, e.g., Orn*, 495 F.3d at 639 (a claimant need not be "utterly incapacitated" to be disabled, and the mere fact that the claimant can perform certain daily activities does not detract from his credibility as to the purported disability overall). What remains are three reasons that might legitimately support the ALJ's credibility finding: (1) findings of normal muscle strength and range of motion in 2000 and early 2001, some of which the ALJ discounted; (2) some "inconsistencies on examination" noted by nurse practitioner Ramirez-Williams, albeit whose opinion the ALJ gave "little weight"; and (3) evidence of Schow's unreported earnings.

We do not use a mechanical formula for determining whether properly supported reasons for an adverse credibility determination are "clear and convincing." Instead, we must evaluate whether the determination is supported by substantial evidence, *i.e.*, relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Orn*, 495 F.3d at 630. Our only prior decision under relatively similar factual circumstances comes from *Batson v. Commissioner*

of Social Security Administration, 359 F.3d 1190, 1197 (9th Cir. 2004), where the court upheld a credibility finding because all but one of the ALJ's reasons were properly supported by the record. Here, the ALJ's reasons were not clear and convincing. The finding of unreported earnings is proper for consideration, but hardly compels the adverse credibility finding. Add to that the ALJ's reliance on the opinion of a nurse practitioner who the ALJ deemed to be an unacceptable medical source and whose opinion the ALJ gave "little weight," and the same result persists. Even with the addition of some normal findings as to muscle strength and range of motion, the ALJ's conclusion is not supported by relevant evidence that a reasonable mind might find adequate. Moreover, given the number of unsubstantiated reasons for the adverse credibility determination, we must conclude that the ALJ arbitrarily discredited Schow's testimony.

The ALJ next erred in rejecting lay witness observations from Schow's mother, Cory Fleming, and friend, Lynn Sims. The ALJ erred by characterizing Fleming's and Sims's observations of Schow's pain and physical limitations as "based to a great extent on the claimant's self-report of symptoms." The record indicates that these witnesses' comments were based on their own observations, not self-reporting. *See Dodrill*, 12 F.3d at 918-19 (cautioning against characterization of witnesses' observations as mere repetition of the claimant's

self-reporting). The ALJ compounded this error by relying heavily on the adverse credibility finding as to Schow's testimony. In doing so, he failed to provide reasons for rejecting Fleming's and Sims's observations that were "germane to each witness." *Id.* at 919. At oral argument, the Commissioner's counsel even conceded that the ALJ "bootstrapped" his rejection of Fleming's and Sims's observations with the credibility finding. Moreover, the erroneous credibility finding provided a problematic foundation for rejection of these observations.

The ALJ's error was not harmless because it is not clear from the record that the error was inconsequential to the ultimate disability determination. *Robbins*, 466 F.3d at 885. When fully credited, these witnesses' statements corroborate Schow's testimony and provide independent observations of his pain and physical limitations. This might have affected the formulation of Schow's residual functioning capacity and, as a result, the analysis at steps four and five.

Finally, by erroneously rejecting Schow's testimony and the lay witnesses' observations, the ALJ improperly omitted certain limitations from the residual functioning capacity that were supported by the record. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988) ("Hypothetical questions posed to the vocational expert must set out all the limitations and restrictions of the particular claimant"). As a result, the ALJ asked the vocational expert ("VE") a series of

hypotheticals at step five that were based on an incomplete set of assumptions. The omissions rendered the questions posed, and her responses, legally deficient and of no evidentiary value. *Robbins*, 466 F.3d at 886 (hypotheticals to a VE based on an incomplete set of limitations are legally inadequate and the VE's responses have no evidentiary value). Therefore, the ALJ's determination that Schow was not disabled, which was based on the VE's deficient responses, was erroneous.

* * *

Based on the foregoing, the ALJ's decision was not free of legal error and was not supported by substantial evidence. Therefore, we reverse the district court's decision affirming the ALJ with directions to remand to the ALJ for further proceedings.

REVERSED AND REMANDED.