

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 LEE P.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.

CASE NO. 3:20-CV-5339-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 I. INTRODUCTION

17 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of the
18 Commissioner of Social Security's ("Commissioner") denial of Plaintiff's application for
19 disability insurance benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure
20 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the
21 undersigned Magistrate Judge. *See* Dkt. 2.

22 After considering the record, the Court concludes the Administrative Law Judge
23 ("ALJ") erred in evaluating Plaintiff's testimony and lay testimony from Plaintiff's mother. The
24 ALJ did not harmfully err in rejecting the opinions of treating psychologist Richard Rinehart,

1 M.D. The Court declines to address whether the ALJ erred in refusing to allow Plaintiff to cross-
2 examine non-examining doctors, as that issue can be dealt with on remand based on any new
3 evidence presented. Accordingly, this matter is reversed and remanded pursuant to sentence four
4 of 42 U.S.C. § 405(g) to the Commissioner for further proceedings consistent with this Order.

5 II. FACTUAL AND PROCEDURAL HISTORY

6 Plaintiff applied for disability insurance benefits in August 2018, alleging disability as of
7 June 30, 2017, later amended to July 31, 2018. *See* Dkt. 14, Admin. Record (“AR”), 17, 91–92,
8 132, 231–32. The application was denied on initial administrative review, and on
9 reconsideration. *See* AR 130–60. A hearing was held before ALJ Malcolm Ross on August 28,
10 2019. *See* AR 86–129. In a decision dated November 29, 2019, ALJ Ross determined Plaintiff
11 to be not disabled. *See* AR 17–28. The Appeals Council denied review. *See* AR 1–4.

12 III. STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
14 social security benefits if the ALJ’s findings are based on legal error or not supported by
15 substantial evidence in the record as a whole. *Ford v. Saul*, 950 F.3d 1141, 1153–54 (9th Cir.
16 2020) (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)).

17 IV. DISCUSSION

18 A. **Whether the ALJ Reasonably Rejected Plaintiff’s Testimony**

19 Plaintiff contends the ALJ failed to give clear and convincing reasons for discounting
20 Plaintiff’s subjective symptom testimony.¹ *See* Dkt. 16, Pl. Op. Br., pp. 12–16. Plaintiff

21
22
23 ¹ Defendant argues in a footnote that Plaintiff failed to challenge the ALJ’s evaluation of
24 his physical impairments. *See* Dkt. 17, Def. Resp. Br., p. 2 n.2. This is inaccurate, as Plaintiff
challenged the ALJ’s determination that Plaintiff received only conservative treatment for his
physical impairments, and that Plaintiff’s daily activities are inconsistent with his physical

1 testified he suffered from posttraumatic stress disorder (“PTSD”) due to his work in the military.
2 AR 99. He testified his PTSD made it difficult to get along with coworkers, follow simple
3 directions, respond appropriately to supervisors, or concentrate. *See* AR 97–98, 112–13, 300–01,
4 339, 344. Plaintiff testified the pressure of quotas when he worked as a military recruiter put
5 substantial stress on him. AR 99.

6 Plaintiff testified he has radiating pain down his arms. AR 97. He testified it was painful
7 to sit due to neck pain. AR 106–07, 114–15, 295, 300. He testified he can sit for about an hour,
8 and would then need 30 minutes of stretching before he could sit back down. AR 111. He
9 reported pain in his shoulder and low back prevent him standing for long periods of time. AR
10 339. He testified he cannot walk for more than two blocks. *Id.*

11 The Ninth Circuit has “established a two-step analysis for determining the extent to
12 which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871 F.3d 664,
13 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has presented objective
14 medical evidence of an impairment that “‘could reasonably be expected to produce the pain or
15 other symptoms alleged.’” *Id.* (quoting *Garrison v. Colvin*, 759 F.3d 995, 1014–15 (9th Cir.
16 2014). At this stage, the claimant need only show the impairment could reasonably have caused
17 some degree of the symptoms; he does not have to show the impairment could reasonably be
18 expected to cause the severity of the symptoms alleged. *Id.* The ALJ found Plaintiff met this
19 first step. *See* AR 23.

20 If the claimant satisfies the first step, and there is no evidence of malingering, the ALJ
21 may only reject the claimant’s testimony “‘by offering specific, clear and convincing reasons for
22

23
24 symptom testimony. *See* Dkt. 16, pp. 13–16. The Court thus considers the ALJ’s evaluation of
Plaintiff’s testimony regarding the severity of his mental and physical symptoms.

1 doing so. This is not an easy requirement to meet.” *Trevizo*, 871 F.3d at 678 (quoting *Garrison*,
2 759 F.3d at 1014-15). In evaluating the ALJ’s determination at this step, the Court may not
3 substitute its judgment for that of the ALJ. *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).
4 As long as the ALJ’s decision is supported by substantial evidence, it should stand, even if some
5 of the ALJ’s reasons for discrediting a claimant’s testimony fail. *See Tonapetyan v. Halter*, 242
6 F.3d 1144, 1148 (9th Cir. 2001).

7 The ALJ rejected Plaintiff’s testimony regarding the severity of his impairments. *See* AR
8 23–25. The ALJ reasoned Plaintiff’s neck and shoulder pain were inconsistent with the level of
9 treatment he received and normal exam findings. AR 23. The ALJ reasoned Plaintiff’s mental
10 health symptoms were inconsistent with the majority of mental status exam findings, and
11 evidence Plaintiff’s symptoms were controlled with medication. AR 24. The ALJ reasoned
12 Plaintiff’s testimony was inconsistent with his functioning as shown by his daily activities. AR
13 24–25. The ALJ reasoned Plaintiff’s testimony was undermined by inconsistencies in his reports
14 regarding possible causes of his PTSD. AR 24.

15 1. The ALJ Erred in Rejecting Plaintiff’s Neck and Shoulder Pain Testimony as
16 Inconsistent with His Level of Treatment and Providers’ Exam Findings

17 The ALJ erred in rejecting Plaintiff’s testimony regarding the severity of his neck and
18 shoulder symptoms based on his level of treatment and allegedly mild symptoms. The treatment
19 Plaintiff received included multiple steroid injections, physical therapy, and electric stimulation.
20 *See* AR 1869, 1889, 2877–84, 2890, 2906, 2920, 2933. Plaintiff at one point opted for more
21 conservative treatment over surgery. *See* AR 2848. But the treatment he received could not
22 actually be called conservative such that it undermined Plaintiff’s testimony as to the severity of
23 his neck and shoulder pain. *See Garrison*, 759 F.3d at 1015 n.20 (“[W]e doubt that epidural
24 steroid shots to the neck and lower back qualify as ‘conservative’ medical treatment.”); *Kager v.*

1 *Astrue*, 256 F. App'x 919, 923 (9th Cir. 2007) (finding error where the ALJ discounted the
2 plaintiff's testimony based on a lack of significant pain therapy, when the plaintiff had been
3 prescribed opioid medications).

4 The ALJ similarly erred in rejecting Plaintiff's neck and shoulder pain testimony based
5 on normal exam findings. An ALJ may reject a claimant's symptom testimony when it is
6 contradicted by the medical evidence. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
7 1155, 1161 (9th Cir. 2008) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.1995)). But
8 the ALJ must explain how the medical evidence contradicts the claimant's testimony. *See*
9 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The evidence to which the ALJ pointed
10 does not contradict Plaintiff's complaints regarding the severity of his pain, as imaging showed
11 cervical spine abnormalities, and Plaintiff continued to report neck pain. *See, e.g.*, AR 2815–17,
12 3162, 3190. That Plaintiff showed normal range of motion, strength, and sensation at several
13 examinations does not refute his claims that he has pain in his neck and shoulders.

14 2. The ALJ Erred in Rejecting Plaintiff's Mental Health Symptom Testimony as
15 Inconsistent with Mental Status Exam Findings in the Record and Based on the
16 Determination that Plaintiff's Symptoms were Controlled with Medication

17 The ALJ erred in rejecting Plaintiff's testimony regarding the severity of his mental
18 health symptoms as inconsistent with the majority of mental status exam findings in the record.
19 The ALJ noted Plaintiff had PHQ-9 scores that ranged from indicating mild to severe symptoms.
20 AR 24. The ALJ also noted Plaintiff had restricted mood and affect on some exams, but other
21 findings were generally within normal limits. *Id.* Many of these normal findings the ALJ cited
22 were very basic, such as statements that Plaintiff had "appropriate demeanor, [and] normal
23 speech," and made during exams focused on treating Plaintiff's neck pain. AR 2898, 2903–04,
24 2912, 2918, 2927, 2931, 2942, 2947. These findings do not clearly or convincingly contradict

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.