



## **Tribbett v. Commissioner of Social Security**

2023 | Cited 0 times | W.D. Washington | May 11, 2023

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

AT TACOMA TIMMY R. T., Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY, Defendant.

Case No. C22-5147-BJR ORDER REVERSING DENIAL OF BENEFITS AND REMANDING FOR FURTHER PROCEEDINGS

Plaintiff seeks review of the denial of his applications for Supplemental Security Income and Disability Insurance Benefits. , the administrative record, and the relevant legal authorities, the Court concludes that the record as a whole creates serious doubt as to whether Plaintiff is disabled, reverses the decision to deny benefits, and remands this case for further administrative proceedings.

I. BACKGROUND Plaintiff is 59 years old, has at least a high school education, and has previously worked as an automobile detailer. Dkt. No. 8 at 34. On December 17, 2018, Plaintiff protectively applied for benefits, alleging disability as of March 1, 2016. Id. at 21. Plaintiff later amended this date to April 29, 2019. Id. at 21. applications were denied initially and on reconsideration. Id. at 119, 127, 144. After the ALJ conducted a hearing on October 7, 2021, the ALJ issued a decision finding Plaintiff not disabled. Id. at 21 35.

II. Utilizing the five-step disability evaluation process, 20 C.F.R. §§ 404.1520, 416.920, the ALJ found:

Step one: Plaintiff has not engaged in substantial gainful activity since April 29, 2019, the amended alleged onset date. Step two: Plaintiff has the following severe impairments: diabetic retinopathy and diabetic macular edema. Step three: These impairments do not meet or equal the requirements of one of the listed impairments in Residual Functional Capacity: Plaintiff has the residual functional capacity to perform a full range of work at all exertional levels but with the following non- exertional limitations. He can perform work that requires occasional fine detail work. He can perform work that requires occasional reading of fine print. He can perform work that requires occasional commercial driving. Step four: Plaintiff cannot perform past relevant work. Step five: As there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, Plaintiff is not disabled. Dkt. No. 8 at 24 35 Id. at 6 9.

III. DISCUSSION whole. Ford v. Saul, 950 F.3d 1141, 1154 (9th Cir. 2020). The ALJ is responsible for



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evaluating

evidence, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Although the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is al. *Ford*, 950 F.3d at 1154 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

Plaintiff contends that the ALJ erred by failing to find his diabetes mellitus and diabetic neuropathy as severe impairments at step two of the sequential evaluation process and rejecting the medical opinions of Dr. Hander and Dr. Cuevas. Dkt. No. 10 at 1. A. Whether the ALJ Erred at Step Two

Plaintiff contends the ALJ erred at step two of the evaluation process by failing to find his diabetes mellitus and diabetic neuropathy as severe impairments. See Dkt. No. 10 at 2 5. The ALJ, , finding that diabetic retinopathy and diabetic macular edema were severe medically determinable impairments. Dkt. No. 8 at 24.

At step two of the evaluation process, the ALJ must determine *Smolen v. Chater*, 80 F.3d 1273,

1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An activities. 20 C.F.R. § 404.1522. most jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling, reaching,

*Smolen*, 80 F.3d at 1290 (quoting 20 C.F.R. § 140.1521(b)). The step-two *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Bowen v. Yuckert*, 482 U.S. 137, 146 47 (1987)). It ments that should be taken into account when determining the (RFC)]. *Buck*, 869 F.3d at 1048 49. At the RFC phase, were earlier deemed not severe. *Id.* at 1049. should be exactly the same regardless *Id.* (emphasis in original). Thus, a claimant cannot be prejudiced by failure to consider a particular impairment severe at step two as long as the ALJ finds the claimant has at least one severe impairment, and still addresses the non- severe impairments See *id.* (citing *Molina*, 674 F.3d at 1115). Plaintiffs retain the burden of proof at step two and must present evidence showing that they suffer from an impairment that has more than a minimal effect on the work. See *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

Here, Plaintiff has failed to meet his burden of showing harmful error as he has not shown that the ALJ ignored any of his particular symptoms or limitations caused by diagnoses not included at step two. See *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (citing *Shinseki v. Sanders*, 556 U.S. 396, 407 09 (2009)) (administrative adjudications are subject to the same harmless error rule as civil cases). As noted, the ALJ found that Plaintiff had severe impairments, and thus continued with the disability evaluation. See Dkt. No. 8 at 24 26. The ALJ also considered See *id.* at 27 34. Thus, regardless whether the ALJ erred in not finding severe his diabetes mellitus and diabetic neuropathy, Plaintiff fails to meet his burden to establish a harmful step-two error. See *Molina*, 674 F.3d at 1111



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(the party attacking an agency decision has the burden to show harmful legal error); Buck, 869 F.3d at 1048 49 (explaining that excluding a diagnosis at step two is not harmful legal error when the ALJ considers all symptoms in assessing RFC). B. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

Plaintiff contends the ALJ erred in evaluating the medical opinions of Dr. Hander and Dr. Cuevas. Dkt. No. 10 at 6 8.

1. Dr. Hander Dr. Hander completed two medical evaluations of Plaintiff in March 2019 and May 2019. Dkt. No. 8 at 94 102, 114 20. In the March 30, 2019 evaluation, Dr. Hander found Plaintiff had severe impairments of loss of central visual acuity, dysfunction major joints, and diabetes mellitus, and determined Plaintiff was disabled with alleged onset date of March 1, 2016. See id. at 98, 101. Less than two months later, on May 10, 2019, Dr. Hander found the listed impairments sabled. Id. at 118 20.

of its , is sufficient medical evidence at the hearing level to See id. at 31 32.

In Woods v. Kijakazi, 32 F.4th 785 (9th Cir. 2022), the Ninth Circuit held that new regulations governing applications filed after March 27, 2017 supplanted its prior holdings governing the weight an ALJ must give medical opinions and the requirement that the ALJ provide specific and legitimate reasons to reject a doctor s opinion. See id. at 790 92. Under the new regulations, the ALJ considers the persuasiveness of the medical opinion using five factors (supportability, consistency, relationship with claimant, specialization, and other), with supportability and consistency being the two most important factors. See 20 C.F.R. §§ 416.920c(b)(2), 404.1520c(b)(2). Supportability means the extent to which a medical source . . . Id. §§ 416.920c(c)(1), 404.1520c(c)(1). Consistency means the extent to which a medical opinion is tent . . . Id. §§ 416.920c(c)(2), 404.1520c(c)(2) the factors of supportability and consistency, Id. §§ 416.920c(b)(2), 404.1520c(b)(2). An ALJ

cannot reject a doctor s opinion as unsupported or inconsistent without providing an explanation supported by substantial evidence. Woods, 32 F.4th at 787. . . . how 20 C.F.R. §§ 416.920c(b), id. §§ 416.920c(b)(2), 404.1520c(b)(2).

Plaintiff contends in crediting the May 2019 opinion but not the

record after Dr. Hander had provided his first opinion. See Dkt. No. 10 at 6 7.

In rejecting explained it Dkt. No. 8 at 31. And in rejecting a

opinion -severe, the history for retinopathy and macular edema. Id. at 32 retinopathy. Id. at 594 95, 606, 609, 616 17. Given the cited evidence, most of which was from



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retinal and other eye specialists, the ALJ could reasonably find that the However,

t regarding Plaintiff's disability changed over such a short period of time, and although the ALJ commented on the discrepancy during the hearing, *id.* at 60, he did not address it in his decision.

The Court concludes that there is a lack of consistent and substantial evidence to support

2. Dr. Cuevas Plaintiff also contends that No. 10 at 7. counsel a Dkt. No. 8 at 638 40. Dr. Cuevas indicated Plaintiff is able to stand/walk or sit upright for less than an hour during

an eight-hour workday. *Id.* at 639. He also indicated that based on needs to recline for two hours during an eight-hour workday. *Id.* Dr. Cuevas also wrote that

Plaintiff can use his hands bilaterally for holding, handling or fingering for less than one third of an eight-hour workday, and his arms bilaterally for one third of an eight-hour workday. *Id.* at 639 40. When asked on *Id.* at 640.

The ALJ rejected Dr. Cuevas June 2021 opinion because it the overall medical evidence *Id.* at 32. assessments were for *Id.* at 512, 542,

608, 619, 626, 630. Additionally, the treatment notes showed that Plaintiff consistently denied any joint and muscle swelling, stiffness, pain, weakness, and cramping, and Plaintiff examination results were consistently normal. See *id.* at 679, 684, 689, 700, 718. treatment notes do not mention diabetic neuropathy until September 2021 when he *Id.* at 717.

Plaintiff asserts that Dr. Cuevas did not record his complaints of extremity pain for several years before the EMG confirmed that he has diabetic neuropathy. Dkt. 10 at 4-5 expressions of surprise during the hearing to learn that his complaints had not been recorded).

Plaintiff has complained of neuropathy symptoms since 2018, he specifically complained of being unable to work due to neuropathy in June 2021, which the ALJ noted in his decision, but the complaint did not appear in Dr. Cuevas treatment notes. Dkt. 8 at 25. Plaintiff asked for a specialist referral in August 2021. *Id.* And at the hearing, the ALJ commented that this is a case *Id.* at 92. Although the ALJ found it non-persuasive, the August 2021 Department of Social and Health Services review opined that Plaintiff of even sedentary level work due to *Id.* at 33.

Plaintiff also points out that the ALJ ignored the results of the September 2021 EMG. Dkt. No. 10 at 7. The results indicate that Plaintiff is experiencing neuropathy due to his diabetes mellitus. See Dkt. No. 8 at 577 84. The EMG report - profound sensorimotor distal axonal and demyelinating neuropathy likely due to diabetes *Id.* at 572. testimony about his symptoms and functional limitations

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The Court concludes that there is a lack of consistent and substantial evidence to support the ALJ's rejection of Dr. Cuevas June 2021 opinion.

Considering the record overall, the evidence is largely inconsistent, and the Court concludes that there are outstanding issues that must be resolved before there can be a finding of disability or non-disability that is supported by substantial evidence. See *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) in social security cases, the required analysis centers on what the record evidence shows about the existence or non-existence of a disability requiring courts to remand for further proceedings when an evaluation of the record as a whole creates serious doubt that a claimant is disabled (citation omitted)). Accordingly, this matter will be reversed for further administrative proceedings, including a de novo hearing.

IV. CONCLUSION For the foregoing reasons, the Court concludes that the ALJ lacked substantial evidence to determine that Plaintiff was not disabled. The final decision is REVERSED and REMANDED for further administrative proceedings.

DATED this 11th day of May 2023.

A Barbara Jacobs Rothstein United States District Judge

