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FILED

JUL 24 2024

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIMBERLY M. WILLIAMS, Plaintiff-Appellant, v. MARTIN J. O'MALLEY, Commissioner of Social Security, Defendant-Appellee.	No. 23-35358 D.C. No. 1:20-cv-02108-CL MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Submitted July 18, 2024**
San Francisco, California

Before: M. SMITH, BENNETT, and JOHNSTONE, Circuit Judges.
Concurrence by Judge JOHNSTONE.

An administrative law judge ("ALJ") denied Kimberly Williams's application for disability insurance benefits under Title II of the Social Security Act ("Act"), and such denial became the Commissioner's final decision. The district court affirmed

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

the denial, and Williams appeals. We have jurisdiction under 42 U.S.C. § 405(g) and 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand with instructions to remand to the agency for further administrative proceedings consistent with this disposition.

"We review the district court's order affirming the ALJ's denial of social security benefits de novo, and we will not overturn the Commissioner's decision 'unless it is either not supported by substantial evidence or is based upon legal error.'" *Woods v. Kijakazi*, 32 F.4th 785, 788 (9th Cir. 2022) (quoting *Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018)).

1. Assuming without deciding that Williams preserved her challenges to the Social Security Administration's 2017 medical-evidence regulations, *see* 20 C.F.R. § 404.1520c, those challenges fail on the merits. Binding precedent forecloses Williams's arguments that the regulations conflict with the Act and the Administrative Procedure Act ("APA"), and that the regulations did not displace our "specific and legitimate" standard. *See Cross v. O'Malley*, 89 F.4th 1211, 1217 (9th Cir. 2024) ("The Social Security Administration's 2017 medical-evidence regulations fall within the broad scope of the Commissioner's authority under the Social Security Act, and the agency provided a reasoned explanation for the regulatory changes, making the regulations neither arbitrary nor capricious under the APA."); *Woods*, 32 F.4th at 787 (holding that the 2017 regulations "displace[d] our

longstanding case law requiring an ALJ to provide 'specific and legitimate' reasons for rejecting an examining doctor's opinion"). Williams identifies no intervening higher authority undercutting that precedent.[1] *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

We also reject Williams's argument that the 2017 regulations violate the major questions doctrine under *West Virginia v. EPA*, 597 U.S. 697 (2022). The *West Virginia* Court invoked the major question doctrine, finding that the case was "extraordinary" because, among other things, the EPA's interpretation of the statute would "empower[] it to substantially restructure the American energy market." *Id.* at 723–24. In contrast, the 2017 medical-evidence regulations outline how an ALJ should weigh medical evidence when deciding individual cases and thus do not present a comparable "extraordinary" grant of regulatory authority. Williams also provides no persuasive reason to think it unlikely that Congress would grant the Social Security Administration authority to adopt regulations governing the weighing of medical evidence. *See id.* at 722–23. On the contrary, the Act

[1] The Supreme Court recently overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which "required courts to defer to 'permissible' agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2254 (2024). But in *Cross*, we held that the Act "plainly encompasse[d] the Commissioner's authority to adopt regulations to govern the weighing of medical evidence," without deferring to the agency's interpretation of the statute. *Cross*, 89 F.4th at 1215. Thus, *Loper* does not undercut *Cross*.

specifically empowers the Commissioner to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence" offered in social security proceedings. 42 U.S.C. § 405(a).

2. We agree with the district court that substantial evidence supports the ALJ's rejection of the March 2020 opinion of Psychiatric Nurse Practitioner Devin Smith ("Smith Opinion"). Under the 2017 regulations, an ALJ must "explain how [he or she] considered the supportability and consistency factors," 20 C.F.R. § 404.1520c(b)(2), and the ALJ's explanation for rejecting a treating doctor's opinion must be "supported by substantial evidence," *Woods*, 32 F.4th at 792.

The ALJ rejected the Smith Opinion because it was inconsistent with "the findings of others, and the record as a whole," and it lacked supportability, as Smith's records leading up to the Smith Opinion did not support the marked limitations endorsed in the Smith Opinion. These conclusions are supported by the record. As pointed out by the ALJ, three doctors found that Williams's conditions were not as severe as endorsed by the Smith Opinion, and other providers had consistently observed that Williams exhibited relatively benign and mild mental symptoms. Our review of Smith's records leading up to the Smith Opinion supports the ALJ's lack-of-supportability conclusion, as those records did not support the marked limitations endorsed in the Smith Opinion. Given that the Smith Opinion conflicted with the record as a whole and lacked supportability, the ALJ's rejection of the opinion was

supported by substantial evidence.

3. The district court correctly rejected Williams's arguments that the ALJ disregarded the combined effects of her physical pain and mental impairment symptoms in his step three analysis. Williams makes no argument that she meets or equals one of the listed impairments. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) ("The claimant carries the initial burden of proving a disability in steps one through four of the analysis."). Thus, even assuming the ALJ erred in disregarding the combined effects of Williams's physical and mental impairments at step three, any error was harmless. *See id.* We also see no error in the ALJ's residual functional capacity ("RFC") analysis regarding the combined effects of Williams's impairments. The ALJ not only stated that he considered the combined effects of her physical and mental impairments in assessing Williams's RFC, but his analysis also shows that he did in fact consider the combined effects.

4. We reverse in part the district court's determination that the ALJ properly rejected Williams's symptom testimony. When, as here, the ALJ has not determined that the claimant is malingering, and finds that there is "objective medical evidence of an underlying impairment which might reasonably produce the pain or other symptoms alleged, the ALJ may 'reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so.'" *Brown-Hunter v. Colvin*, 806 F.3d 487, 492–93 (9th Cir. 2015)

(quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). The ALJ must "identify specifically which of [the claimant's] statements [he] found not credible and why." *Id.* at 493.

While the ALJ properly rejected Williams's testimony about her agoraphobia and racing or uncontrolled thoughts, he erred by failing to give clear and convincing reasons for rejecting Williams's testimony that she experiences sudden manic episodes even with her medications. Because we cannot conclude that Williams's symptom testimony about her manic episodes is inconsequential to the ultimate nondisability determination,[2] we cannot conclude that the ALJ's error was harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1121–22 (9th Cir. 2012), *superseded by regulation on other grounds as stated in Thomas v. Saul*, 830 F. App'x 196, 198 (9th Cir. 2020). Thus, we remand for the agency to consider Williams's testimony about her manic episodes.

5. Because the ALJ committed reversible error in rejecting Williams's testimony about her manic episodes, we also hold that the ALJ committed reversible error by failing to give any reasons for discounting Williams's husband's written

[2] Williams's husband reported that, during these episodes, Williams engages in "impulsive behaviors with negative consequences" and "get[s] highly agitated and throw[s] things" when he tries to limit those impulsive behaviors. Respectfully, we disagree with the concurrence's position that we can assume the ALJ relied on these statements from Dr. Shields's opinion simply because the ALJ restated what was in Dr. Shields's opinion.

testimony about her manic episodes. *Cf. id.* at 1122 (holding harmless the ALJ's failure to comment upon lay testimony where "the ALJ had validly rejected all the limitations described by the lay witnesses in discussing [the claimant's] testimony").[3] [4]

6. We reject Williams's argument that we should remand her case for an award of benefits. A remand for an award of benefits is not appropriate when, as here, "an ALJ makes a legal error, but the record is uncertain and ambiguous" as to whether the claimant is entitled to benefits. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014). "[T]he proper approach is to remand the case to the agency." *Id.*

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.[5]

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[3] Because the ALJ properly rejected Williams's symptom testimony about her agoraphobia and racing or uncontrolled thoughts, the ALJ's failure to address her husband's corresponding testimony was harmless. *See Molina*, 674 F.3d at 1122.

[4] Because the Commissioner fails to argue that any exception to forfeiture applies, we decline to address his argument raised for the first time on appeal that the 2017 regulations do not require an ALJ to articulate a reason for rejecting lay testimony. *See Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006).

[5] The parties shall bear their own costs on appeal.

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JOHNSTONE, Circuit Judge, concurring in the judgment:

I agree with the majority's resolution of parts one, two, three, and six in the memorandum disposition, and I agree that we should reverse as to part five. However, I would affirm as to part four because, in my view, the administrative law judge ("ALJ") accepted Williams's testimony regarding her manic episodes and our caselaw only requires the ALJ to provide specific, clear, and convincing reasons to reject a claimant's symptom testimony. *See Garrison v. Colvin*, 759 F.3d 995, 1014–15 (9th Cir. 2014); *Dodrill v. Shalala*, 12 F.3d 915, 917–18 (9th Cir. 1993). To describe the testimony ostensibly rejected by the ALJ, the majority cites a statement from the clinical history summary in the January 2019 medical opinion of Dr. Thomas Brent Shields ("Shields Opinion"). But the ALJ specifically relied on the Shields Opinion as the basis for his nondisability determination, including by restating in material part the quote in footnote 2 of the disposition. Because the ALJ specifically relied on the Shields Opinion and accepted that Williams experiences manic episodes as part of her bipolar I disorder, I would not reverse for reconsideration of Williams's testimony.

Nonetheless, I agree that we should reverse and remand for additional fact-finding as to part five. The ALJ erred by failing to discuss Williams's husband's testimony. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012), *superseded*

on other grounds by 20 C.F.R. § 404.1502(a). His testimony contradicts Williams's testimony on several key points, including her ability to complete daily activities, as well as the improvement in her mental impairment symptoms, including her manic episodes. Accordingly, I agree with the majority that the failure to discuss this testimony was not harmless, *see id.* at 1122, and I concur in the judgment.