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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 JOEL GODINEZ, ) No. CV 08-00091-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION  
14 ) AND ORDER  
15 v. )  
16 ) (Social Security Case)  
17 MICHAEL J. ASTRUE, )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
22 )  
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28 )

18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and transcript of the record before  
24 the Commissioner. The parties have filed the Joint Stipulation  
25 ("JS"), and the Commissioner has filed the certified Administrative  
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") erred in making

1 credibility findings as to Plaintiff and as to third party  
2 witnesses;

3 2. Whether the ALJ failed to provide Plaintiff with a full and  
4 fair hearing;<sup>1</sup>

5 3. Whether the ALJ failed to adequately comply with the  
6 instructions by the Appeals Council in its remand order.

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8 This Memorandum Opinion will constitute the Court's findings of  
9 fact and conclusions of law.

10 After reviewing the matter, the Court concludes that the decision  
11 of the Commissioner must be affirmed.

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13 I

14 **THE ALJ PROPERLY EVALUATED THE NATURE**  
15 **AND EXTENT OF PLAINTIFF'S SEVERE IMPAIRMENTS (ISSUE NO. 2)**

16 Plaintiff applied for disability insurance benefits ("DIB") on  
17 October 23, 2000. His date last insured ("DLI") under Title II of the  
18 Social Security Act ("Act") is March 31, 2000. He claims an onset  
19 date of July 1, 1997.

20 Plaintiff was initially accorded a hearing before an ALJ, which  
21 resulted in an unfavorable decision dated September 10, 2003. (AR 120-  
22 128.) The Appeals Council issued a remand order on May 26, 2004. (AR  
23 195-198.) Additional medical evidence was admitted to the record on

24 \_\_\_\_\_  
25 <sup>1</sup> As framed by Plaintiff, this issue fails to identify  
26 Plaintiff's claims, as set forth in the JS at 15-16. A correct  
27 recitation of the issues encompasses the following: the ALJ failed to  
28 develop the record with regard to Plaintiff's foot condition and his  
seizures, and the ALJ erred in determining Plaintiff's mental status.  
(See, Id.) The Court will discuss Issue No. 2 as incorporating these  
separate contentions.

1 remand. (AR 2, 507-544.) Plaintiff attended two additional hearings  
2 before a new ALJ, on April 19, 2005 and June 17, 2005. (AR 79-94, 95-  
3 114.) This resulted in a decision filed on August 3, 2005, finding  
4 Plaintiff to be not disabled under the Act. (AR 19-27.)

5 In his second issue, Plaintiff makes three separate contentions  
6 of error, which the Court will address.

7  
8 **A. Failure to Develop Record Regarding Foot Ailment.**

9 The ALJ evaluated a left foot fracture which Plaintiff suffered  
10 in 2001, indicating that subsequent examinations showed essentially  
11 normal gait and range of motion within normal limits. (AR 21, 294-298,  
12 507-518, 375-401.) As of November 2004, Plaintiff reported occasional  
13 ankle swelling with some pain symptoms for which he took over-the-  
14 counter ibuprofen. (AR 21-22, 508.) Plaintiff indicated to a  
15 consultative examiner ("CE") that he could walk five blocks and carry  
16 25 pounds. (Id.) Following the 2003 hearing, Plaintiff underwent a  
17 bunionectomy on his left foot on November 12, 2004, which, the ALJ  
18 noted, addressed and corrected a specific problem and resulted in an  
19 uneventful recovery after a normal period of convalescence. (AR 22,  
20 529-536, 537-544.)

21 Plaintiff asserts that the ALJ failed to note that his bunion was  
22 "florid" long before the surgery, as early as January 2003. (AR 15,  
23 citing AR 564, 581.) Plaintiff asserts that the ALJ erred in failing  
24 to request an orthopedic evaluation of Plaintiff following the  
25 bunionectomy. (Id.)

26 As the ALJ noted, at the April 19, 2005 hearing, testimony was  
27 taken from medical expert ("ME") Dr. Sparks, who relied upon a  
28 consultative internal medicine evaluation ("CE") of November 1, 2004

1 (just prior to the foot surgery) by Dr. Rocely Ella-Tamayo, which  
2 limited Plaintiff to standing and walking for four hours at a time.  
3 (AR 85, 511-512.<sup>2</sup>)

4 Further, while Dr. Sparks noted that Plaintiff had claimed to Dr.  
5 Ella-Tamayo that he had been having pain in his foot for ten years,  
6 there are inconsistencies in Plaintiff's own reporting, in that he  
7 made no such claim in his October 2000 disability report (AR 242), but  
8 did so in his October 2001 report. (AR 258.) In any event, the issue  
9 Plaintiff raises with regard to his bunion condition is essentially  
10 not relevant to the determination of his disability. The vocational  
11 expert ("VE") testified that an individual who had a reduced capacity  
12 for standing and walking due to bunion surgery could, nevertheless,  
13 perform thousands of jobs in the local and national economy. (AR 107-  
14 109.) Plaintiff does not dispute that even if his RFC reduced his  
15 ability to stand and walk from that found by the ALJ, he would still  
16 be able to perform significant work in the local and national economy.  
17 (See 20 C.F.R. §§404.1520(g), 416.920(g) (2008).)

18  
19 **B. Mental Status.**

20 Plaintiff asserts error in the ALJ's finding that he does not  
21 have a severe mental disorder (other than depression). (JS at 15-16,  
22 20-21.)

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24 <sup>2</sup> As noted by the ALJ, there is a discrepancy between the  
25 residual functional capacity ("RFC") assessed narratively by Dr. Ella-  
26 Tamayo and her assertions in the form attached to her report, which  
27 limit Plaintiff to standing and/or walking for two hours in an eight-  
28 hour workday. (AR 23, 515.) The ALJ noted that nothing in the actual  
clinical findings would limit Plaintiff to standing for only two  
hours, except for the brief period of time before he underwent his  
bunionectomy. (Id.)

1           The ALJ's decision rejects a May 2003 assessment of Plaintiff's  
2 mental status performed by Dr. Ascani, a psychologist. (AR 23-24, 498-  
3 502.) Indeed, Dr. Ascani opined that Plaintiff had a cognitive  
4 disorder and major depression with marked and extreme mental  
5 limitations. (AR 500, 505-506.) In order to reject Dr. Ascani's  
6 opinion, and instead rely upon the conclusions of another examining  
7 physician, the ALJ must provide specific and legitimate reasons  
8 supported by substantial evidence. See Bayliss v. Barnhart, 427 F.3d  
9 1211, 1216 (9<sup>th</sup> Cir. 2005). In this case, the ALJ extensively  
10 discussed the mental health evidence in the record, and noted that Dr.  
11 Ascani's opinion conflicted with that of other examining doctors,  
12 including Dr. Edelman, who examined Plaintiff in 2001, and Dr. Smith,  
13 who examined Plaintiff in 2004. (AR 24, 287-292, 519-524.) The ALJ  
14 also noted clinical findings by neurologist Dr. Mays, and also the  
15 findings of Drs. Edelman and Smith, which contradicted Dr. Ascani's  
16 conclusion that Plaintiff has a disabling mental impairment. (AR 23,  
17 290-291, 296, 521-523.) Further, with regard to Dr. Ascani, the ALJ  
18 severely depreciated her credibility because, for example, she noted  
19 gait and posture limitations, while the examining neurologist found no  
20 abnormality of gait. (AR 23, 294-298.) The neurologist also opined  
21 that no assistive devices were necessary and that Plaintiff was able  
22 to perform fine motor activity with both upper and lower extremities.  
23 (Id.) The ALJ also noted inconsistencies in Dr. Ascani's conclusion  
24 that Plaintiff's walk was uneven because he cannot see very well. (AR  
25 23, citing AR 500.) Again, as the ALJ noted, the neurologist noted no  
26 visual impairment, and the same conclusion was reported by the  
27 internal medicine CE on November 1, 2004 who found Plaintiff's visual  
28 acuity to be 20/30 in both eyes without corrective lenses, and noted

1 that Plaintiff was visually able to move about without assistance. (AR  
2 23, citing AR at 513.)

3 The Court agrees with Plaintiff's complaint that the ALJ  
4 apparently depreciated the validity of Dr. Ascani's psychological  
5 testing based on his own interpretation, rather than any expert  
6 evidence in the record. Nevertheless, despite this shortcoming, the  
7 ALJ's remaining reasons for discounting Dr. Ascani's conclusions are  
8 based on substantial evidence, and must upheld.

9  
10 **C. Seizure Disorder.**

11 With regard to seizure symptoms, Plaintiff asserts that the ALJ  
12 "overstepped" in his evaluation of the seizure symptoms, by relying on  
13 his own interpretation of testimony and medical records concerning the  
14 effect of Plaintiff's seizure medication. (JS at 16, citing AR 25.<sup>3</sup>)  
15 Plaintiff also asserts that the ALJ failed to obtain additional  
16 medical evidence regarding the effect of his seizure medication. (Id.)

17 At the hearing, the ME testified that Plaintiff was not complying  
18 with his medication up to the middle of 2001, at which time he was  
19 still drinking alcohol, and further, that he had a low Dilantin level  
20 in June of 2001. The ME noted that Plaintiff claimed to be having one  
21 or two seizures a month, but in March 2001, told Dr. Edelman that he  
22 was having seizures every three months. (AR 23.) Further, new  
23 evidence submitted to the Appeals Council included an October 2004  
24 report by neurologist Dr. Hijazin. (AR 592-594.) This physician noted

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<sup>3</sup> The Court understands an ALJ's responsibility as including  
27 interpretation of testimony and medical records. Thus, as phrased,  
28 Plaintiff's issue is a non sequitur. The Court will, instead,  
evaluate whether the testimony and medical records constitute  
substantial evidence.

1 that Plaintiff had had seizures in the past which were admitted by him  
2 to be related to alcohol, that he was not taking any medication, and  
3 that he was asymptomatic. (Id.) At the hearing, Plaintiff testified  
4 that his seizures were correlated with his failure to take medication.  
5 (AR 92.) (See also Dr. Ella-Tamayo's note in November 2004 that  
6 Plaintiff was not taking medication for seizures [AR 508].)

7 Plaintiff's assertion that the ALJ had a duty to develop the  
8 record is not borne out by the facts or the law. Such a duty is only  
9 manifested where the evidence is ambiguous or inadequate for proper  
10 evaluation of a claim. See Mayes v. Massanari, 276 F.3d 453, 459 (9<sup>th</sup>  
11 Cir. (2001); Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001).

12 For the foregoing reasons, the issues set forth in Plaintiff's  
13 second claim are without merit.

## 14 15 II

### 16 THE ALJ'S CREDIBILITY FINDINGS

#### 17 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

18 Plaintiff challenges the credibility findings made by the ALJ  
19 both as to himself and as to family members. Plaintiff specifically  
20 claims that the ALJ failed to follow requirements for credibility  
21 assessment described in Social Security Ruling ("SSR") 96-7p. (JS at  
22 6.)

23 In evaluating subjective symptoms, it is required that the ALJ  
24 evaluate whether, first, there is medical evidence of an underlying  
25 impairment reasonably likely to be the cause of the alleged symptoms,  
26 and once that is established, to provide specific, clear and  
27 convincing reasons to reject such allegations. (See Bunnell v.  
28 Sullivan, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991)(en banc); Thomas v.

1 Barnhart, 278 F.3d 947, 960 (9<sup>th</sup> Cir. 2002). Further, factors in  
2 assessing credibility are specifically laid out in 20 C.F.R.  
3 §§404.1529(c)(3); 416.929(c)(3) (2008). These are not exclusive  
4 factors but are specifically noted to be among those with relevance to  
5 the evaluation of credibility. The Court is required to examine the  
6 credibility findings contained in the ALJ's decision to determine  
7 whether these legal standards have been met. Here, the ALJ noted that  
8 Plaintiff has received routine and conservative treatment; that pain  
9 medication is limited to occasional consumption of mild analgesics;  
10 that Plaintiff has not been compliant in taking his seizure  
11 medication; that Plaintiff has not been prescribed medication for any  
12 condition other than difficulty sleeping, which has improved; that  
13 Plaintiff's statements on the record suggest exaggeration of symptoms  
14 as to frequency of seizures. (AR at 25.)

15 With regard to inconsistent statements about seizures, the fact  
16 is that Plaintiff reported varying frequencies of seizures of a  
17 significant level of distinction. The Court has already reviewed this  
18 evidence in its decision. Moreover, as the ALJ noted, while Plaintiff  
19 alleged that he did little besides sitting and watching television,  
20 this assertion lacked some credibility based on other evidence in the  
21 record, which indicated that he is able to dress and bathe himself, do  
22 simple shopping, read the newspaper, attend church periodically, take  
23 the bus or get a ride for transportation, and help with cleaning and  
24 cooking. (See AR at 25, citing AR 508.)

25 Plaintiff's reported inability to communicate in English was also  
26 noted by the ALJ as being inconsistent with evidence in the record,  
27 such as the fact that he has also admitted to being 70% fluent in  
28 English. (AR 90-91.)



1 Finally, with regard to Plaintiff's contention that the ALJ  
2 improperly depreciated the testimony of his family members, the Court  
3 notes that the ALJ concluded that these statements establish no  
4 different conclusions than Plaintiff's own testimony. (AR 25.) The  
5 ALJ's statement that these statements would be devalued because  
6 Plaintiff's family has a pecuniary interest in his obtaining  
7 disability benefits is not an appropriate basis upon which to  
8 depreciate the credibility of these statements. As Plaintiff  
9 correctly notes, family members typically have an interest, which may  
10 also be pecuniary, in a family member obtaining benefits.  
11 Nevertheless, the real issue here is whether these statements add  
12 anything of import to Plaintiff's own contentions with regard to his  
13 subjective limitations, and in that regard, the Court answers in the  
14 negative. Moreover, these lay opinions conflicted with medical  
15 evidence, and the ALJ justifiably depreciated the lay opinions in  
16 favor of the medical testimony. See Lewis v. Apfel, 236 F.3d 503, 511  
17 (9<sup>th</sup> Cir. 2001).

18 The Court thus concludes that Plaintiff's first issue has no  
19 merit.

### 20 21 III

#### 22 THE ALJ ADEQUATELY COMPLIED WITH 23 INSTRUCTIONS OF THE APPEALS COUNCIL

24 Plaintiff's third and final issue is that the Appeals Council  
25 ordered the ALJ to obtain additional evidence concerning his  
26 impairments, including a mental status examination with psychological  
27 testing and medical source statements, but that the ALJ failed to  
28 comply.

1 After the first hearing, additional evidence was received,  
2 including the CE by Dr. Ella-Tamayo of November 1, 2004, a psychiatric  
3 evaluation of Dr. Smith of November 5, 2004; and additional medical  
4 records. (AR 507-544.) After ALJ Varney's decision, the Appeals  
5 Council determined that there was no basis to change the decision,  
6 concluding that the ALJ had considered lay witness evidence with  
7 regard to evaluation of credibility. (AR 5-6.)

8 The parties raise an interesting question, that is, whether the  
9 Court can evaluate ALJ Varney's decision based upon whether or not it  
10 complied with the remand order of the Appeals Council. As the  
11 Commissioner notes, the remand order itself is not subject to review  
12 or enforcement by the Court. (JS at 23, citing Russell v. Bowen, 856  
13 F.2d 81, 84 (9<sup>th</sup> Cir. 1988).) The Court's role is limited to  
14 evaluating the decision of the ALJ. Here, the Court has extensively  
15 and exhaustively discussed the adequacy of the ALJ's evaluation of the  
16 medical evidence, including evidence as to Plaintiff's foot problems,  
17 seizures, and his mental status. The Court has found the ALJ's  
18 decision to be supported by substantial evidence. The ALJ discharged  
19 his duty both to evaluate the evidence and to properly resolve any  
20 conflicts.

21 For the foregoing reasons, the decision of the ALJ will be  
22 affirmed. The Complaint will be dismissed with prejudice.

23 **IT IS SO ORDERED.**

24  
25 DATED: December 8, 2008

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/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE