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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ERNEST C. WASHINGTON,)	No. CV 08-08535-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. On August 11, 2009, Plaintiff filed a Motion for Summary Judgment, Memorandum of Points and Authorities and Statement of Uncontroverted Facts and Conclusions of Law in support of the Motion for Summary Judgment ("MSJ"). The Commissioner's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary

1 Judgment were filed on September 1, 2009 ("Opposition"). Plaintiff
2 has not filed a Reply. The Commissioner has filed the certified
3 Administrative Record ("AR"). The matter is now ready for
4 adjudication.

5 In his Statement of Genuine Issues to Motion for Summary
6 Judgment, Plaintiff asserts that he has the following severe
7 impairments:¹

- 8 1. Diabetes mellitus Type I (uncontrolled);
- 9 2. Diabetic neurothopy [sic];
- 10 3. Peripheral artery disease;
- 11 4. Discoid lupus;
- 12 5. Meningitis;
- 13 6. Depression; and
- 14 7. Insomnia.

15
16 This Memorandum Opinion will constitute the Court's findings of
17 fact and conclusions of law. After reviewing the matter, the Court
18 concludes that the decision of the Commissioner must be affirmed.

19
20 I

21 **THE ALJ DID NOT ERR IN FINDING THAT**

22 **PLAINTIFF DID NOT HAVE A SEVERE IMPAIRMENT**

23 In a comprehensive 14-page decision, the ALJ determined that

24
25 ¹ In view of the fact that the Administrative Law Judge
26 ("ALJ"), in his decision (AR 11-24), found that Plaintiff does not
27 have any severe impairments (see 20 C.F.R. §§404.1521, 416.921
28 (2009)), the Court views Plaintiff's MSJ as attacking the ALJ's
decision at Step Two of the sequential evaluation process (see 20
C.F.R. §§404.1520(a), 416.920(a)), that he does not have a severe
impairment.

1 Plaintiff has medically determinable impairments of insulin dependent
2 diabetes mellitus with sometimes poor control; hypertension;
3 hypercholesterolemia; bilateral renal cysts; and adjust order,
4 depressed. (AR 14.) The ALJ found, however, that Plaintiff does not
5 have any severe impairments. (AR 15.)

6 This decision reflects the ALJ's thorough consideration of the
7 evidence and resolution of any conflicts in the medical testimony.
8 See Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). Indeed,
9 each of the impairments identified by the ALJ at Step Two of the
10 sequential evaluation process, but found to be not severe, is
11 discussed exhaustively in the decision, with references to the medical
12 evidence. Indeed, Plaintiff had claimed additional impairments at the
13 administrative level, which are also discussed by the ALJ. Thus, he
14 claimed a back impairment; however, as the ALJ noted, consultative
15 clinical examinations ("CE"), including examinations of Plaintiff's
16 back, had been unremarkable. (See AR at 14, citing exhibits.) No
17 neurological deficit had been noted during these examinations. (Id.)
18 Next, the ALJ noted that Plaintiff had alleged symptoms in his lower
19 extremities, such as pain, swelling, and numbness, but the ALJ noted
20 that a bilateral arterial duplex examination of his lower extremities
21 with color Doppler imaging performed in October 2006 was negative, and
22 that the evidence does not substantiate any diabetic neuropathy or any
23 end-organ damage related to diabetes mellitus. (See AR at 14, citing
24 exhibits.)

25 Plaintiff had claimed that he had bad or blurry vision not
26 treatable with corrective lenses, but the ALJ noted that there was no
27 substantiation by any diagnostic or reliable clinical findings, and
28 that Plaintiff reports that he continues to have a valid driver's

1 license. (AR 15, citing exhibits.) Plaintiff's allegation that had
2 lupus was, as the ALJ again noted, completely unsupported by any
3 diagnostic or reliable clinical findings which would substantiate such
4 a condition as medically determinable. Plaintiff has not seen a
5 rheumatologist, and takes no medications for lupus. (AR 15, citing
6 exhibits.) At this point, it should be noted that Plaintiff's lack of
7 treatment, or at best, very conservative treatment for certain
8 conditions, is highly relevant, since Plaintiff did have medical
9 insurance and access to health care, as the ALJ noted. (AR 18, 62,
10 135, 240-257, 295-320, 346-378, 406-423.)

11 Plaintiff's allegation that he has heart disease and has had a
12 heart attack is totally contradicted, as the ALJ noted, by the fact
13 that a workup of Plaintiff's heart in July 2006 was unremarkable.
14 Plaintiff testified he has rarely seen a cardiologist and only takes
15 aspirin, assertedly for a heart condition. There are no diagnostic
16 studies or any reliable clinical findings which would substantiate
17 Plaintiff's allegations in this regard. (See AR at 15, citing
18 exhibits.)

19 The ALJ noted that there is no evidence in the record of any
20 neurological deficits, and that the Plaintiff's claim file has no
21 evidence which would substantiate headaches as a medically
22 determinable impairment. (Id., citing exhibits.)

23 With regard to mental issues, the ALJ noted that at one point,
24 Plaintiff alleged that he heard voices in his head at night, but
25 denied having hallucinations at a CE in 2006, and never reported such
26 symptoms to Pasadena Mental Health Center, where he was at one time
27 being treated. At a psychological CE conducted in October 2007, the
28 ALJ noted that Plaintiff again reported hearing voices, but the claim

1 file has no evidence from any contemporaneous treating source which
2 would substantiate such allegations. (Id., citing exhibits.)

3 Thus, the presence of impairments was largely substantiated by
4 Plaintiff's own descriptions and complaints. For that reason, the ALJ
5 undertook a careful examination of Plaintiff's credibility, finding it
6 severely lacking.

7 A brief discussion of applicable law as to credibility assessment
8 is merited.

9 The weight to be given to a claimant's statements concerning
10 symptomology are governed by clear procedural requirements and
11 applicable regulations and case law. 20 C.F.R. §404.1529 is entitled,
12 "How we evaluate symptoms, including pain." In subsection "a", the
13 regulation provides that, "In determining whether you are disabled, we
14 consider all your symptoms, including pain, and the extent to which
15 your symptoms can reasonably be accepted as consistent with the
16 objective medical evidence and other evidence." The regulation
17 describes objective medical evidence as consisting of "medical signs
18 and laboratory findings." The definition of "other evidence" is
19 contained in 20 C.F.R. §§404.1512(b)(2) through (6) and
20 404.1513(b)(1), (4), and (5), and (d). As stated in §404.1529(a),

21 "These include statements or reports from you, your
22 treating or non-treating source, and others about your
23 medical history, diagnosis, prescribed treatment, daily
24 activities, efforts to work, and any evidence showing how
25 your impairment(s) and any related symptoms affect your
26 ability to work."

27
28 The regulation also indicates that a claimant's statements about

1 symptoms, including pain, will be considered, but, importantly, notes
2 that,

3 "However, statements about your pain or other symptoms
4 will not alone establish that you are disabled; there must
5 be medical signs and laboratory findings which show that you
6 have a medical impairment(s) which could reasonably be
7 expected to produce the pain or other symptoms alleged and
8 which, when considered with all of the other evidence ...
9 would lead to a conclusion that you are disabled."

10
11 In 20 C.F.R. §404.1529(c)(3), it is specifically provided that
12 the claimant's statements about symptoms will be considered. Relevant
13 factors to be considered are enumerated, and include the following:
14 daily activities [referred to in this Memorandum Opinion as activities
15 of daily living, or ADL], location, duration, frequency and intensity
16 of pain or other symptoms; precipitating and aggravating factors;
17 type, dosage, effectiveness and side effects of any medications;
18 treatment other than medication which has been received; and any other
19 measures used to relieve pain and other symptoms."

20 Evaluation of symptoms is also guided by Social Security Ruling
21 ("SSR") 96-7p. In what is often described as a two-step analysis, the
22 first step consists of a determination of whether there is an
23 underlying medically determinable physical or mental impairment which
24 could reasonably be expected to produce the individual's pain or other
25 symptoms. The second step involves an evaluation of the extent to
26 which these symptoms limit an individual's ability to do basic work
27 activities. See also Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
28 1991)(en banc). Where the first step has been met, it is the

1 Commissioner's burden to articulate clear and convincing reasons to
2 reject the claimant's testimony regarding subjective symptoms. See
3 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998)(citing Lester v.
4 Chater, 81 F.3d 821, 834 (9th Cir. 1995)). Otherwise, the Commissioner
5 must articulate at least specific and legitimate reasons to reject
6 subjective symptom testimony. See Bunnell, 947 F.2d at 347.

7 If there is affirmative demonstrating that a claimant is
8 malingering, then the Commissioner's reasons for rejecting claimant's
9 testimony need not be "clear and convincing." Lester v. Chater, 81
10 F.3d 821, 834 (9th Cir. 1995).

11 Indeed, in this case, the ALJ noted substantial evidence of
12 malingering based on the medical records. For example, in a
13 psychological CE conducted by Dr. Donahue, she found that Plaintiff
14 was "exceptionally disingenuous and putting forth a very poor effort."
15 (AR 20, 323-331.) As Dr. Donahue noted, testing which she
16 administered did suggest malingering. (AR 19, 326.)

17 In making the credibility determination, the ALJ noted many
18 inconsistencies in Plaintiff's testimony. First, he indicated that he
19 did not consider an Exertional Daily Activities Questionnaire dated
20 December 14, 2003, because it was part of the claim file from
21 Plaintiff's prior application, which was not being reopened. (AR 16.)
22 The ALJ noted Plaintiff's allegations of his inability to work due to
23 burning in his feet, pain in his toes, blurry vision, headaches, and
24 his entire body hurting all the time. He noted a Function Report -
25 Adult, in which Plaintiff alleges that he was awake for most of the
26 night because he could not sleep, had stabbing pains in his feet,
27 could not perform house or yard work due to lack of energy, that his
28 body always hurt, that sunlight made him dizzy and nauseous, that he

1 had difficulty lifting, squatting, bending, standing, reaching,
2 walking, kneeling, talking, stair climbing, memory, completing tasks,
3 concentration, following instructions, and getting along with others,
4 and that his ability to ambulate was just in his house, such as from
5 his bedroom to his bathroom, and that he had a short attention span.
6 (AR 15, citing exhibit.) He noted Plaintiff's allegations of his
7 inability due to exhaustion resulting from uncontrolled diabetes
8 mellitus and lupus in addition to other factors. (Id.) He noted
9 Plaintiff's claims that his condition had deteriorated. (Id.) He
10 noted Plaintiff's claims that he had to take two to three naps a day,
11 and was simply exhausted. (AR 17, citing exhibit.) He noted
12 Plaintiff's continuing complaints of pain and burning in his legs and
13 feet, that his wrists and ankles were more swollen, that his diabetes
14 mellitus was out of control, that he began experiencing shortness of
15 breath, fatigue, and chest pain, and that simple ADL such as showering
16 and getting dressed had become very difficult because of constant pain
17 and fatigue. Plaintiff asserted his mother did practically everything
18 for him with regard to ADL and he stayed in bed most of the day
19 because of pain and could not be on his feet for more than five
20 minutes because they would start to burn. (Id., citing exhibits.) The
21 ALJ noted Plaintiff's testimony at the hearing that he was unable to
22 work due to extreme fatigue or feeling tired all the time, pain in his
23 ankles and toes, swollen feet, low back pain, inability to sleep at
24 night, and difficulty concentrating. (Id.)

25 The ALJ found, at the First Step of the Bunnell analysis, that
26 Plaintiff's medically determinable impairments could reasonably be
27 expected to produce some of the alleged symptoms. At Step Two,
28 however, he found that Plaintiff is not credible with regard to the

1 intensity, persistence, and limiting effects of these symptoms. He
2 cited numerous reasons. First, he noted that the objective medical
3 evidence does not substantiate disability. Thus, as reflected in the
4 ALJ's exhaustive discussion of the medical record, he noted that many
5 of the subjective complaints asserted by Plaintiff are simply related
6 to medically determinable impairments. This includes his assertion of
7 a back impairment or cardiovascular impairment. He noted that
8 Plaintiff had an essentially normal examination with the CE internist
9 in May of 2006, Dr. Siciarz-Lambert. (AR 17, citing exhibit.) The
10 ALJ noted also an unremarkable CE examination from
11 internist/rheumatologist Dr. Srinivasan in late September 2007. (AR
12 18, citing exhibit.) The ALJ reviewed Dr. Srinivasan's report,
13 concluding that it contains no diagnostic or reliable clinical
14 findings which would substantiate any end-organ damage due to
15 hypertension, hypercholesterolemia, or diabetes mellitus. Plaintiff's
16 renal cysts are being treating conservatively. (Id.) The ALJ noted
17 that as to Plaintiff's primary treating physician, Dr. Galfaian, the
18 progress notes are cursory and contain very few clinical details as
19 would be expected for an individual of Plaintiff's young age with such
20 alleged extreme symptoms and limitations. (Id., citing exhibits.)

21 Concerning Plaintiff's asserted mental impairment, the ALJ noted
22 a mental status consulting psychiatric examination, which did not
23 substantiate any severe mental impairment. (Id., citing exhibit.)
24 Similarly, the ALJ noted that Dr. Donahue's psychological CE does not
25 substantiate a severe mental impairment due to poor effort and
26 malingering. (Id., citing exhibit.)

27 The ALJ further cited the fact that while Plaintiff reported that
28 he needed a cane to walk outside his home, he did not appear at two

1 recent consultative examinations with a cane. (AR 18-19, 325, 332-
2 333.) There was no record of any support for use or prescription of
3 a cane. (AR 19.)

4 In support of his MSJ, Plaintiff has submitted Exhibits A and B.
5 This is considered new evidence, but is only considered material if it
6 bears directly and substantially on the decision in this case. See
7 Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). The Court
8 determines that while the evidence is new, it is at best cumulative,
9 and does not change the outcome of this case.

10 Not covered by the Commissioner in his Opposition is the ALJ's
11 discussion of Plaintiff's claim of alleged side effects from his
12 medications, which Plaintiff made both in written submissions and at
13 the hearing. (AR 19, citing exhibits.) The ALJ noted that medical
14 records from treating sources do not substantiate such allegations.
15 While side effects of medications are a specific and relevant factor
16 in credibility assessment (see 20 C.F.R. §404.1529(c)(3)(iv)), the ALJ
17 noted that there is simply no medical evidence to support the
18 existence of side effects of medication, especially including any
19 complaints Plaintiff made to treating or examining sources regarding
20 such matters.

21 The ALJ also considered the third party report from Plaintiff's
22 mother. (AR 20, citing exhibit.) Plaintiff's mother indicated that
23 Plaintiff spent an average day at the time reading, listening to
24 music, and sitting on the patio outside his room. He helped take care
25 of his son, made lunches, did small amounts of laundry, and helped his
26 son with some of his homework. Plaintiff had no problem with his own
27 personal care, was able to handle his own money, and, according to his
28 mother, did not need to use any assistive devices, such as a cane. (AR

