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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DALLAS D. BURHUS,)	No. CV 09-02550-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. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified Administrative Record ("AR").

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 developed the record;

2 2. Whether the ALJ properly considered the lay witness
3 testimony; and

4 3. Whether the ALJ considered Plaintiff's testimony and made
5 proper credibility findings.

6 (JS at 2.)

7
8 This Memorandum Opinion will constitute the Court's findings of
9 fact and conclusions of law. After reviewing the matter, the Court
10 concludes that the decision of the Commissioner must be affirmed.

11
12 I

13 **THE ALJ DID NOT FAIL TO PROPERLY DEVELOP THE RECORD**

14 On May 12, 2008, Plaintiff had a consultative psychological
15 evaluation ("CE") from Dr. Sherrill. (AR 426-432.) Plaintiff arrived
16 for his appointment in an apparently intoxicated condition,
17 accompanied by his cousin. Plaintiff's cousin indicated that
18 Plaintiff had suffered an accident resulting in a six-month hospital
19 stay. (AR 428.) Dr. Sherrill noted that there were no records
20 indicating a six-month hospital stay because of an accident. (AR 431.)
21 Plaintiff, on that basis, argues that the ALJ had an obligation to
22 develop the record.

23 First, the Court notes that the absence of records of any
24 accident, if such records exist, did not impair Dr. Sherrill's ability
25 to render a diagnostic impression and a functional assessment. (AR
26 431-432.) In any event, the Commissioner correctly notes that
27 Plaintiff and his counsel were given numerous and ample opportunities
28 to provide relevant evidence to support the claim of a disabling

1 impairment. These opportunities are summarized in the Commissioner's
2 portion of the JS, and include the fact that Plaintiff never mentioned
3 any such treatment for an accident in any of the administrative
4 records (AR 112-113, 131, 137-138); that Plaintiff was advised to
5 obtain and submit to the ALJ updated medical evidence prior to the
6 hearing (AR 72); that a compact disk containing all the evidence was
7 sent to Plaintiff prior to the hearing, on January 10, 2008 (AR 79);
8 that Plaintiff got another notice from the agency on January 24, 2008
9 reminding him that he could submit additional medical evidence before
10 the hearing (AR 23); that, at the hearing, the ALJ asked Plaintiff if
11 he had reviewed the record and whether he had any objection to it (AR
12 31-32), and Plaintiff did not object (AR 32); that the ALJ asked
13 Plaintiff if there were any other documents or if the record was
14 complete, and Plaintiff's attorney indicated that it was complete (AR
15 32); and finally, that Plaintiff had an opportunity to submit
16 additional evidence to the Appeals Council, but failed to do so (AR 4,
17 9). Indeed, Plaintiff has the burden of producing such evidence. See
18 Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005).

19 Further, Plaintiff was sent out for both a psychological CE and
20 a physical CE. Following those examinations, functional capacity
21 assessments were made based upon the clinical examinations. Plaintiff
22 has not explained how, if any additional historic records of treatment
23 existed, they would have impacted the actual assessments made during
24 these examinations.

25 In sum, there is no ambiguous or incomplete evidence which has
26 been demonstrated to exist in this record which would have any impact
27 upon the disability assessment. Only in such situations is there an
28 obligation to develop the record. See Mayes v. Massanari, 276 F.3d

1 453, 459-60 (9th Cir. 2001). Consequently, the Court finds no error
2 with regard to the first issue.

3
4 **II**

5 **THE ALJ DID NOT FAIL TO PROPERLY CONSIDER LAY WITNESS TESTIMONY**

6 At the hearing, Plaintiff's cousin, Jason Zink, testified on
7 Plaintiff's behalf, and during that testimony, recounted that
8 Plaintiff falls down; that Plaintiff has had leg problems as long as
9 he can remember; that Plaintiff has to use a cane; that Plaintiff
10 doesn't sleep because he is always in pain; that Plaintiff's doctor
11 rendered an opinion that Plaintiff is unable to take pain medication
12 due to his brain damage; that Plaintiff is unable to write more than
13 his name; that Plaintiff falls down even with a cane, and that this is
14 not due to intoxication. (Id.)

15 Plaintiff correctly points out that the ALJ failed to mention
16 this lay witness testimony.

17 The Commissioner agrees that Plaintiff's summary of Jason Zink's
18 testimony is correct, and also agrees that it was not mentioned by the
19 ALJ. Indeed, relevant and pertinent lay witness testimony can be
20 rejected only if reasons germane to such witness's testimony are
21 articulated. See 20 C.F.R. §§404.1513(e)(2); 416.913(e)(2); Dodrill
22 v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

23 Plaintiff also notes the holding of Stout v. Commissioner, 454
24 F.3d 1050, 1056 (9th Cir. 2006), which confirms that harmless error
25 analysis applies in Social Security cases. Thus, it would be harmless
26 error in this case for the ALJ to disregard Mr. Zink's testimony if it
27 can be confidently concluded that no reasonable ALJ, when fully
28 crediting the testimony, would have reached a different determination.

1 Indeed, the Court views this as such a case.

2 First, Mr. Zink's testimony fairly well mirrored that of
3 Plaintiff himself at the hearing. For example, Plaintiff testified
4 that he does not take pain medication because his doctor believes he
5 will bleed in his brain. (AR 37-38.) He testified he hardly sleeps
6 because of his pain. (AR 38.) He can't walk, because his legs are
7 just worn out. (AR 37.) He needs a cane because he can't walk. (Id.)
8 He does, however, have the ability to read and write. (AR 34.)

9 Thus, in essence, Mr. Zink added nothing to Plaintiff's own
10 testimony, and in view of the fact that Plaintiff's credibility was
11 depreciated by the ALJ (see discussion, infra, concerning Issue 3),
12 this is particularly significant. Moreover, there is no medical
13 evidence supporting several of Mr. Zink's assertions, such as that
14 Plaintiff's doctor told him he could not take pain medication due to
15 the risk of a brain bleed. Further, Plaintiff was on numerous
16 instances prescribed pain medication. (AR 46, 114, 166, 174, 218, 224,
17 240, 249, 253, 301, 425.) While Mr. Zink testified that Plaintiff
18 fell down even absent his alcohol abuse, it appears that this
19 conclusion is not well substantiated by the record, since alcohol is
20 and has been a substantial part of Plaintiff's problems. (AR 46, 186,
21 209, 439.)

22 It is also the case that Mr. Zink accompanied Plaintiff to both
23 of his consultative examinations, and provided information which was
24 considered by the consultative examiners. (AR 426-32, 437-41.) As
25 such, since the ALJ considered the opinions of the consultative
26 examiners, it was not further necessary to incorporate into his
27 decision the specific information provided to the consultative
28 examiners by Plaintiff's cousin.

1 Based on the foregoing, the Court finds that any failure to
2 specifically discuss the testimony of Plaintiff's cousin, Jason Zink,
3 is harmless error, and relief is not merited on Issue No. 2.
4

5 **III**

6 **THE ALJ PROPERLY CONSIDERED PLAINTIFF'S CREDIBILITY**

7 In his third issue, Plaintiff makes the argument that the ALJ
8 erred by failing to make any credibility findings ("The ALJ did not
9 discuss any of the Plaintiff's statements or testimony from the
10 hearing."). (JS 9.)

11 A review of the ALJ's decision indicates that numerous
12 evidentiary bases were cited to depreciate Plaintiff's credibility.
13 First, the only severe impairment found by the ALJ was that Plaintiff
14 had suffered from basal cell carcinoma of the right lower eyelid.
15 There is no objective medical evidence to support Plaintiff's other
16 complaints, including leg and stomach impairments, which clearly are
17 not caused by basal cell carcinoma. (AR 14.) Next, the ALJ found
18 evidence of malingering, based on the conclusions reached by both
19 consultative examiners. (AR 426, 429-32, 437, 442.) Malingering is a
20 substantial and adequate independent reason to make a negative
21 credibility assessment. See Benton v. Barnhart, 331 F.3d 1030, 1040
22 (9th Cir. 2003).

23 The ALJ cited additional reasons for discrediting Plaintiff.
24 There was no medical evidence in support of his complaints of leg pain
25 and severe discomfort. (AR 14.) At the consultative examination,
26 Plaintiff's claim that he would collapse if he stood up from his
27 wheelchair was not substantiated. (AR 437.) Plaintiff insisted he is
28 unable to walk, but allowed to stand on his own, he could stand up,

1 | albeit with a trembling leg and slightly stooped over. (AR 441.) When
2 | the consultative examiner asked him to remove his boots, Plaintiff
3 | screamed in pain when his cousin attempted to do this, but then
4 | suddenly rose from the examination table, sat in a chair, bent his
5 | left knee, and removed his boots. (AR 441.) Clearly, these are all
6 | relevant factors in a credibility assessment.

7 | Plaintiff claimed he could not take pain medication but was
8 | repeatedly prescribed pain medication. (AR 46, 114, 166, 174, 218,
9 | 224, 240, 249, 253, 301, 425.)

10 | Both consultative examiners determined that Plaintiff did not
11 | give maximum or consistent effort in the examinations. During the
12 | physical medicine CE, Plaintiff was uncooperative and disruptive. (AR
13 | 14, 437, 441-42.) As the Court previously noted, during his
14 | psychological CE, Plaintiff was intoxicated to the extent that he
15 | could hardly participate in the examination. (AR 14, 426-32.)

16 | Despite Plaintiff's severe symptom complaints, he failed to
17 | report these to his treating physicians. (AR 14.) There is no
18 | evidence that he sought medical treatment for his assertedly agonizing
19 | pain. Finally, although Plaintiff claimed that he drank alcohol only
20 | to relieve pain and in moderate amounts, the record indicates a 30-
21 | year history of alcohol abuse and frequent alcohol intoxication. (AR
22 | 14, 174, 209, 225, 307.)

23 | All in all, even if Plaintiff argued that the reasons cited by
24 | the ALJ were insufficient to substantiate an adverse credibility
25 | finding, that argument would have no merit. Thus, the Court finds no
26 | error with regard to the ALJ's credibility determination.

27 | //

28 | //

1 The decision of the ALJ will be affirmed. The Complaint will be
2 dismissed with prejudice.

3 IT IS SO ORDERED.

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5 DATED: January 21, 2010

6 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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