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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EDWARD VALDEZ,)	No. CV 10-02840-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 Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

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

1 evaluated the medical evidence in assessing Plaintiff's
2 residual functional capacity ("RFC"); and

- 3 2. Whether the ALJ properly evaluated Plaintiff's subjective
4 pain complaints.

5 (JS at 2-3.)

6
7 This Memorandum Opinion will constitute the Court's findings of
8 fact and conclusions of law. After reviewing the matter, the Court
9 concludes that for the reasons set forth, the decision of the
10 Commissioner must be reversed.

11
12 I

13 **THE ALJ ERRED IN FAILING TO DETERMINE THAT NON-EXERTIONAL**
14 **LIMITATIONS IN PLAINTIFF'S RIGHT UPPER EXTREMITY**
15 **DID NOT CONSTITUTE A SEVERE IMPAIRMENT**

16 Plaintiff sustained multiple gunshot wounds in April 2007. (AR
17 62, 380, 22.) In a progress note made a few weeks after these
18 injuries were sustained, on May 23, 2007, it was reported that
19 Plaintiff complained increasing pain in his right shoulder, and that
20 he was awaiting a call from "LAC/USC."¹

21 Following the gunshot wounds, Plaintiff was hospitalized for two
22 weeks. According to a progress note dated April 22, 2008 by the
23 occupational therapist ("OT"), Sherry Shaffer, after being discharged,
24 Plaintiff, who did not have medical insurance, was not followed up by
25 physicians. (AR 298.) In that same report, the OT noted that

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27 _____
28 ¹ It would appear that this acronym is a reference to Los Angeles County Hospital, administered by the University of Southern California.

1 Plaintiff had deficits throughout his right upper extremity secondary
2 to a brachial plexus injury, gunshot wounds, and humerus fracture. It
3 was indicated that Plaintiff would benefit from occupational therapy
4 services "to attempt to [increase] ROM [range of motion] and function
5 of right upper extremity." (Id.) The OT noted that Plaintiff "has
6 never been followed up for brachial plexus injury nerve damage." (Id.)

7 A progress note by the OT of May 5, 2008 indicates the extent of
8 damage from a bullet which entered Plaintiff's right medial clavicle
9 and exited his right shoulder. It was noted that Plaintiff had major
10 brachial plexus injury, and presently experienced pain on a level of
11 6/10 most of the time and also, Plaintiff had decreased sensation
12 throughout his right upper extremity. (AR 297.)

13 On June 19, 2008, the OT noted that Plaintiff had continued
14 limitations with range of motion distally in the right upper
15 extremity, with poor fine motor coordination in that area as well as
16 limitations in his gross motor skills. He had temperature changes in
17 his right upper extremity, with poor tolerance to heat and increasing
18 complaints of pain. (AR 293.)

19 In reports of July 2, 2008 and July 29, 2008, the OT again noted
20 that Plaintiff had poor fine motor coordination in his right upper
21 extremity, and that pain and numbness decreased his ability to
22 complete daily tasks. Plaintiff reported an inability to move at
23 times to complete tasks secondary to his pain and numbness. Plaintiff
24 had decreased sensation in his right hand, and his right upper
25 extremity was also affected by heat. Although Plaintiff made good
26 progress with his occupational therapy overall, he appeared to have
27 decreased strength and coordination "which are not resolving." (AR
28 285-286, 289.)

1 On September 23, 2008, in a discharge note, the OT indicated that
2 Plaintiff had continued decreased strength and fine motor coordination
3 deficits. Although no limitations were listed when such were
4 requested from a physician, Plaintiff was "encouraged ... to utilize
5 [right upper extremity] as much as tolerated." (AR 280.)

6 Plaintiff testified that he saw physicians while he was
7 hospitalized after the gunshot wounds at Antelope Valley Hospital. He
8 has had surgeries to his arms. He indicated that he had been doing
9 physical therapy, but had stopped because "they couldn't do anymore
10 [sic] to help me out." He put in paperwork to have physical therapy
11 in March 2008, and stopped in September. He was referred to another
12 physical therapist, but stated "I couldn't do it." At the hearing,
13 the ALJ questioned Plaintiff why he did not start treatment until
14 March of 2008. Plaintiff answered as follows:

15 "A Yes, due to the fact we didn't know after I was out of the
16 hospital they, no one really knew how to get help. They
17 didn't know how to get any -- no other doctors were trying
18 to help us. They just let me go and that's that.

19 Q Okay. So how did it come to pass that you got the care
20 again?

21 A I was in so much pain and my mom started making calls to
22 different places until someone told her where to go to get
23 help."

24 (AR 383.)

25
26 The ALJ did not find that Plaintiff had a severe impairment of
27 any kind from the gunshot wounds. (AR 21, Finding 3.) Thus, the ALJ
28 determined that Plaintiff has the capacity to perform the full range

1 of medium work. (Id., Finding 5.)

2 The ALJ fairly well summarized Plaintiff's testimony at the
3 hearing, in the following portion of his decision:

4 "[Plaintiff] testified that he experiences constant
5 pain and numbness in his right arm on a daily basis. He
6 stated that three of his fingers get numb and he has pain
7 from his bicep to his elbow. He testified his pain level
8 everyday is at a 5 and goes up to about a 10 when his body
9 temperature rises. He indicated that on a hot day, or even
10 when he is using his left arm which causes his body
11 temperature to rise, his pain increases to an intolerable
12 level and he starts sweating, shaking, and would have to
13 turn on the air conditioner or use an ice pack to lower his
14 body temperature and relieve some of the pain by [sic]. He
15 also noted that he has to rest his arm in front of his
16 stomach because it causes the least amount of pain and that
17 his doctor advised against wearing a sling so that he does
18 not get used to it. He testified that he is taking
19 medications for treatment which make him a little drowsy and
20 does not make the pain go away.

21 [Plaintiff] testified that he cannot use his right hand
22 or arm at all. He stated that has difficulty holding a cup
23 with his right hand because of the numbness in three of his
24 fingers. He also stated that he has difficulty dressing,
25 bathing, or tying his shoes and requires assistance from his
26 mother or brother. He acknowledged that he is able to use
27 his left arm and hand, but noted that if his body
28 temperature rises from using his left arm, the pain

1 increases in his right arm. He stated that he takes 3 to 5
2 hour naps during the day and does not go out of his house
3 unless he is going to his father's house. He testified that
4 he can drive a car, but not on hot days. He also noted that
5 his concentration is affected when the pain is bad because
6 he starts shaking and sweating."

7 (AR 22.)

8
9 Plaintiff's mother, Martha Ramos, also testified at the hearing,
10 and the ALJ summarized her testimony in the following portion of his
11 decision:

12 "Plaintiff's mother, Martha Ramos, testified that
13 [Plaintiff] can no longer work. She has seen him in pain,
14 sweating and shaking and would have to turn on the air
15 conditioner for him. She indicated that [Plaintiff] did not
16 get treatment because they could not afford the doctor, but
17 when his condition worsened, she starting calling different
18 places to get information on where he can get medical
19 treatment. Ms. Ramos stated that [Plaintiff] does not use
20 his right hand as much and just used it to hold a cup. She
21 stated that his medication makes him drowsy or is in a haze
22 because when she talks to him she has to check if he is
23 listening and also opined that he his [sic] more irritable.
24 She confirmed that she or [Plaintiff's] brother helps
25 [Plaintiff] get dressed."

26 (AR 23.)

27
28 At Step Two of the sequential evaluation process, an ALJ must

1 determine that a severe impairment exists if it (whether alone or in
2 combination with other impairments) significantly limits a claimant's
3 physical or mental ability to do basic work activities. See 20 C.F.R.
4 §§404.1520(c) and 416.920(c). The Ninth Circuit has clearly
5 articulated that an impairment or combination of impairments may be
6 found to be not severe only if the evidence establishes a slight
7 abnormality that has no more than a minimal effect on an individual's
8 ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996).
9 Moreover, the Commissioner has stated in Social Security Ruling
10 ("SSR") 85-28 (1985) that "[I]f an adjudicator is unable to determine
11 clearly the effect of an impairment or combination of impairments on
12 the individual's ability to do basic work activities, the sequential
13 evaluation should not end with the non-severe evaluation step." Thus,
14 it is well understood that step two is a "de minimis screening device
15 [used] to dispose of groundless claims," Smolen, 80 F.3d at 1290. An
16 ALJ may only find that a claimant lacks a medically severe impairment
17 or combination of impairments when the conclusion to that effect is
18 "clearly established by medical evidence." SSR 85-28. Further, while
19 a claimant's statements about pain or other symptoms do not alone
20 establish disability, such evidence, in combination with medical signs
21 and laboratory findings demonstrating a medical impairment, is clearly
22 relevant. See 20 C.F.R. §416.929(a)(2010). Where a claimant provides
23 testimony in the form of subjective reporting of pain or other
24 symptoms, and there is no evidence of malingering, such relevant
25 evidence may only be rejected under a "clear and convincing" standard.
26 See Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005), citing Reddick
27 v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).

28 It is apparent that Plaintiff did have serious exertional and

1 non-exertional functional limitations in his right upper extremity
2 from the gunshot wound, as evidenced by the progress notes of the OT
3 through September 2008. Indeed, there is no medical evidence to the
4 contrary. The Court thus struggles to understand on what basis the
5 ALJ could possibly have determined that Plaintiff does not have a
6 severe impairment in his right upper extremity as a result of the
7 gunshot wounds. The ALJ does cite a progress note from August 2008
8 which indicated that Plaintiff had made gains overall, that he
9 experienced decreased numbness from his last reported visit, but that
10 he continued to have pain in his right upper extremity. He did have
11 increased strength and better fine motor coordination in that area.
12 (AR 23, 282.) This progress note, however, is not consistent,
13 overall, with the longitudinal progress reports summarized by the
14 Court. Further, in a progress report of September 23, 2008, which the
15 Court has already summarized, the OT noted that Plaintiff had
16 continued decreased strength and fine motor coordination deficits. (AR
17 280.) The ALJ also cited signs of reinnervation from an EMG/NCS study
18 on June 19, 2008. (AR 24.) But nerve regeneration is not equivalent
19 to a lack of functional deficits. It appears to the Court that the
20 ALJ selectively cited isolated snippets from the progress notes which
21 effectively misstated the competent evidence in the record in order to
22 justify a conclusion that Plaintiff did not have a severe impairment.
23 This was error. See Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.
24 1984); see also Fiorello v. Heckler, 725 F.2d 174, 176 (2nd Cir. 1983)
25 (the ALJ cannot selectively choose evidence in the record that
26 supports his conclusions); Whitney v. Schweiker, 695 F.2d 784, 788 (9th
27 Cir. 1982)("[A]n ALJ must weigh all the evidence and may not ignore
28 evidence that suggests an opposite conclusion.")(citation omitted).

1 The ALJ also erred in discounting Plaintiff's credibility.
2 Although Plaintiff's testimony at the hearing, which was summarized in
3 the ALJ's decision, and quoted in this decision, and the testimony of
4 his mother were consistent with the progress notes of the OT,
5 nevertheless the ALJ found that Plaintiff's subjective complaints and
6 alleged limitations "are out of proportion to the objective clinical
7 findings as noted above and are not consistent with the treatment he
8 received." (AR 25.)

9 The ALJ focused in great detail on the fact that Plaintiff had
10 not obtained treatment for his gunshot wounds, for almost a year
11 following his discharge from the hospital in 2007 until approximately
12 April 2008. As viewed by the ALJ, if Plaintiff were indeed
13 experiencing the level of pain and functional limitations to which he
14 testified, he would have sought and obtained treatment. In a lengthy
15 discussion which the Court views as almost entirely speculative, the
16 ALJ asserts that Plaintiff could have "gone to any County clinic for
17 that matter, for information on where he can go for medical treatment
18 ... It would not have taken 1 year after his injury to find medical
19 treatment, even if he initially did not know where he can obtain
20 medical services." (AR 26.)

21 These negative conclusions were drawn despite the fact that
22 Plaintiff gave an explanation during his testimony at the hearing that
23 he did not know how to get help and that no other doctors were trying
24 to help him. Indeed, the ALJ responded to that testimony by stating,
25 "Okay. So how did it come to pass that you got the care again?" (AR
26 383.) Plaintiff then responded that he was in so much pain that his
27 mother started making calls to different places until someone told her
28 where to go to get help. (Id.) No inquiry was made by the ALJ as to

1 whether services were in fact available, or, indeed, if Plaintiff or
2 his mother had the level of sophistication necessary to know how to
3 obtain such services. An equally reasonable conclusion to explain the
4 failure to obtain services might be that the indigent care system
5 simply did not follow through with Plaintiff, and he may not have been
6 assertive enough to know how to work the system to try to get help.
7 This is not just a conclusion that this Court draws, but is consistent
8 with a whole range of case decisions from both this Circuit and other
9 Circuits which hold that if, because of financial limitations, a
10 claimant does not obtain medical services, that cannot be held against
11 the claimant in the disability evaluation process. In the Ninth
12 Circuit, it has been held that "[d]isability benefits may not be
13 denied because of the claimant's failure to obtain treatment [he]
14 cannot obtain for lack of funds." Gamble v. Chater, 68 F.3d 319, 321
15 (9th Cir. 1995). See also Dawkins v. Bowen, 848 F.2d 1211, 1213 (11th
16 Cir. 1988)(while remediable conditions are not generally disabling,
17 that condition is disabling if claimant cannot afford prescribed
18 treatment); Lovelace v. Bowen, 813 F.2d 55, 59 (5th Cir. 1987)("The
19 medicine or treatment an indigent person cannot afford is no more a
20 cure for [his] condition than if it had never been discovered");
21 Teeter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985) (inability to
22 afford surgery justifies failure to undergo); Gordon v. Schweiker, 725
23 F.2d 231, 237 (4th Cir. 1984)("It flies in the face of the patent
24 purposes of the Social Security Act to deny benefits to someone
25 because [he] is too poor to obtain medical treatment that may help
26 [him].").

27 Thus, this matter must be remanded as to both issues raised by
28 Plaintiff. It is unquestionable that Plaintiff does have a severe

