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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

RENATO C. SUSA,
Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

) Case No. CV 10-6478 JCG

) **MEMORANDUM OPINION AND
ORDER**

I.

INTRODUCTION AND SUMMARY

On September 2, 2010, plaintiff Renato C. Susa (“Plaintiff”) filed a complaint against defendant Michael J. Astrue (“Defendant”), the Commissioner of the Social Security Administration, seeking review of a denial of disability insurance benefits (“DIB”). [Docket No. 3.]

On March 24, 2011, Defendant filed his answer, along with a certified copy of the administrative record. [Docket Nos. 12, 13.]

In sum, having carefully studied, *inter alia*, the parties’ joint stipulation and the administrative record, the Court concludes that, as detailed below, the medical evidence submitted for the first time to the Appeals Council poses no reasonable probability of changing the outcome of the decision of the Administrative Law

1 Judge (“ALJ”). Thus, the Court affirms the Commissioner’s decision denying
2 benefits.

3 **II.**

4 **PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

5 Plaintiff, who was 48 years old on the date of his administrative hearing, has
6 an eighth grade education completed in the Phillipines. (*See* Administrative Record
7 (“AR”) at 174, 181-82, 235, 265.)

8 On February 12, 2007, Plaintiff protectively filed for DIB, alleging that he has
9 been disabled since May 23, 2006 due to back problems, arthritis, ulcers, difficulty
10 sleeping, and emotional stress. (*See* AR at 198, 235, 256, 260.)

11 On May 30, 2008, Plaintiff, represented by counsel, appeared and testified at a
12 hearing before an ALJ. (*See* AR at 174-96.) The ALJ also heard testimony from
13 Sandra Schneider, a vocational expert (“VE”). (*Id.*) An interpreter was present to
14 assist Plaintiff at the hearing. (*Id.*)

15 On August 20, 2008, the ALJ denied Plaintiff’s request for benefits. (AR at
16 52-66.) Applying the well-known five-step sequential evaluation process, the ALJ
17 found, at step one, that Plaintiff has not engaged in substantial gainful activity since
18 his alleged onset date. (*Id.* at 55.)

19 At step two, the ALJ found that Plaintiff suffers from severe impairments
20 consisting of “disc disease of the lumbar spine[,] depressive disorder [not otherwise
21 specified,] and alcohol abuse.” (AR at 55 (emphasis omitted).)

22 At step three, the ALJ determined that the evidence did not demonstrate that
23 Plaintiff’s impairments, either individually or in combination, meet or medically
24 equaled the severity of any listing set forth in the Social Security regulations.^{1/} (AR
25 at 63.)

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^{1/} *See* 20 C.F.R. pt. 404, subpt. P, app. 1.

1 The ALJ then assessed Plaintiff’s residual functional capacity^{2/} (“RFC”) and
2 determined that he can perform light work. (AR at 63.) Specifically, the ALJ
3 determined that:

4 [Plaintiff] can lift and carry up to 20 pounds occasionally and 10
5 pounds frequently. He can stand and walk for 6 hours and can sit
6 for 6 hours in an 8-hour workday, with normal breaks. However,
7 he must be permitted to alternate sitting and standing as needed.
8 He is also moderately limited in performing complex tasks and
9 has a moderate limitation on attention and concentration.

10 (*Id.* (emphasis omitted).)

11 The ALJ found, at step four, that Plaintiff lacks the ability to perform his past
12 relevant work. (AR at 64.)

13 At step five, based on Plaintiff’s RFC and the VE’s testimony, the ALJ found
14 that “there are jobs that exist in significant numbers in the national economy that
15 [Plaintiff] can perform,” including cashier and counter clerk. (AR at 65 (bold
16 omitted).) Thus, the ALJ concluded that Plaintiff was not suffering from a disability
17 as defined by the Act. (*Id.* at 66.)

18 Plaintiff filed a timely request for review of the ALJ’s decision and submitted
19 additional evidence in conjunction with his request for review, which was denied by
20 the Appeals Council. (AR at 1-4, 46.) The ALJ’s decision stands as the final
21 decision of the Commissioner.

22 III.

24 ^{2/} Residual functional capacity is what a claimant can still do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
26 n. 5 (9th Cir. 1989). “Between steps three and four of the five-step evaluation, the
27 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant’s
28 residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

1 **STANDARD OF REVIEW**

2 This Court is empowered to review decisions by the Commissioner to deny
3 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
4 Administration must be upheld if they are free of legal error and supported by
5 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001, *as*
6 *amended* Dec. 21, 2001). If the court, however, determines that the ALJ’s findings
7 are based on legal error or are not supported by substantial evidence in the record,
8 the court may reject the findings and set aside the decision to deny benefits.
9 *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*,
10 242 F.3d 1144, 1147 (9th Cir. 2001).

11 “Substantial evidence is more than a mere scintilla, but less than a
12 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant
13 evidence which a reasonable person might accept as adequate to support a
14 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d
15 at 459. To determine whether substantial evidence supports the ALJ’s finding, the
16 reviewing court must review the administrative record as a whole, “weighing both
17 the evidence that supports and the evidence that detracts from the ALJ’s
18 conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be affirmed
19 simply by isolating a specific quantum of supporting evidence.” *Aukland*, 257 F.3d
20 at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the
21 evidence can reasonably support either affirming or reversing the ALJ’s decision,
22 the reviewing court “may not substitute its judgment for that of the ALJ.” *Id.*
23 (quoting *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

24 **IV.**

25 **ISSUE PRESENTED**

26 A single disputed issue is presented here: whether newly submitted evidence,
27 a physical RFC questionnaire completed by treating physician Philip A. Sobol, M.D.
28 (“Dr. Sobol) was properly considered by the Appeals Council. (*See* Joint Stip. at 4-

1 15, 19.)

2 V.

3 **DISCUSSION AND ANALYSIS**

4 A. New Evidence

5 Plaintiff argues that the Appeals Council did not provide legally sufficient
6 reasons for rejecting the RFC questionnaire form completed by Dr. Sobol and
7 submitted for the first time to the Appeals Council. (Joint Stip. at 4.)

8 1. Request for Review by Appeals Council

9 Social Security regulations provide that where new and material evidence is
10 submitted to the Appeals Council with the request for review, the entire record will
11 be evaluated and review of the ALJ's decision will be granted where the Appeals
12 Council finds that the ALJ's action, findings, or conclusion is contrary to the weight
13 of the evidence currently of record. 20 C.F.R. § 404.970(b). Post-decision evidence
14 considered by the Appeals Council is part of the record on review by this Court.
15 *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d
16 967, 971 (9th Cir.), *cert. denied*, 519 U.S. 881 (1996).

17 To be material, the new evidence must bear "directly and substantially on the
18 matter in dispute." *Mayes*, 276 F.3d at 462 (internal quotation marks and citation
19 omitted). Material evidence should relate to the period on or before the date of the
20 ALJ's decision. *See* 20 C.F.R. § 404.970(b). The claimant must also demonstrate a
21 "reasonable possibility" that the new evidence would have changed the disability
22 determination. *Mayes*, 276 F.3d at 462.

23 2. The Appeals Council Did Not Err in Denying Review of the
24 ALJ's Decision

25 The Court concludes that the Appeals Council properly determined that the
26 new evidence did "not provide a basis for changing the [ALJ's] decision," (AR at 2),
27 and finds that Plaintiff fails to show the evidence would have changed the outcome
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1 of the ALJ's decision.^{3/} Three reasons guide this determination.

2 First, the diagnoses made in the RFC questionnaire are cumulative and were
3 properly considered by the ALJ. Dr. Sobol repeatedly diagnosed Plaintiff with, *inter*
4 *alia*, lumbar spine sprain/strain and bilateral wrist tendinitis. (*See, e.g.*, AR at 68,
5 71, 80.) In the newly-submitted form, completed on February 1, 2010, Dr. Sobol
6 restated his diagnoses of "lumbar sprain/strain" and "bilateral wrist/forearm
7 tendinitis." (*Id.* at 477, 481.) Prior to Plaintiff's submission of the RFC form and
8 based on his evaluation of the medical evidence, the ALJ found Plaintiff's "disc
9 disease of the lumbar spine" to be severe, but concluded that his tendinitis was not
10 severe, a finding which Plaintiff does not dispute here. (*See id.* at 55, 64; *see*
11 *generally* Joint Stip. at 4-15, 19.)

12 Second, the newly-submitted RFC assessment is not supported by substantial
13 evidence. In the questionnaire, Dr. Sobol opined that Plaintiff is limited to sitting
14 and/or standing continuously no more than two hours and fifteen minutes at "one
15 time." (AR at 479.) Dr. Sobol also found Plaintiff can stand and/or walk less than
16 two hours in an eight-hour work day and sit about two hours in an eight-hour work
17 day. (*Id.*) Dr. Sobol indicated that Plaintiff would need to walk for five minutes
18 every twenty minutes "at will" in an eight-hour work day and take between two to
19 six unscheduled breaks during the work day. (*Id.* at 479-80.) Further, Dr. Sobol
20 determined that Plaintiff would occasionally be able to lift and/or carry less than ten
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22 ^{3/} Contrary to Defendant's argument, (Joint Stip. at 17), the Court need not
23 decide whether there was good cause for Plaintiff's late submission of evidence. 42
24 U.S.C. § 405(g) deals with review of an ALJ's decision by the district court – *not* by
25 the Appeals Council – and the "good cause" requirement therein specifically
26 addresses the failure to "incorporate [new] evidence into the record *in a prior*
27 *proceeding.*" The Appeals Council's review in this case was a "prior proceeding,"
28 and pursuant to *Ramirez*, 8 F.3d at 1452, Plaintiff's additional evidence became part
of the administrative record *before* this case reached federal court. Thus, this Court
may consider it.

1 pounds, but would never be able to lift and/or carry any object that is ten pounds or
2 heavier. (*Id.* at 480.)

3 However, Dr. Sobol’s RFC assessment is not supported by his own treatment
4 notes. (*See* AR at 68-71, 72-83 (orthopedic evaluation, dated October 9, 2007,
5 reporting “some improvement of [Plaintiff’s] low back symptoms with acupuncture”
6 and “patient noted some improvement of his symptoms” subsequent to pain
7 management consultation), 84-90, 462-73 (progress report, dated September 26,
8 2006, indicating that MRI scan of lumbar spine revealed “mild to moderate
9 degenerative changes of the lumbosacral spine” and noting no “weakness . . . in the
10 major muscles tested in the bilateral upper and lower extremities”).)

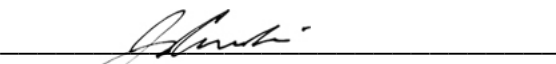
11 Accordingly, Plaintiff cannot demonstrate a reasonable possibility that the
12 RFC questionnaire would have changed the ALJ’s decision because Dr. Sobol’s
13 RFC questionnaire provided only conclusory observations without any supporting
14 clinical findings. (*See* AR at 477-81); *Batson v. Comm’r of Soc. Sec.*, 359 F.3d
15 1190, 1195 (9th Cir. 2004) (ALJ may discredit treating physicians’ opinions that are
16 conclusory, brief, and unsupported by the record as a whole, or by objective medical
17 findings); *cf. Booz v. Sec’y of Health & Human Servs.*, 734 F.2d 1378, 1380-81 (9th
18 Cir. 1984) (new evidence is material when it creates a reasonable possibility that the
19 outcome of the case would be different).

20 Third, the Court finds that the weight of the evidence supports the ALJ’s
21 finding that Plaintiff was not suffering from a disability as defined by the Act. (*See*,
22 *e.g.*, AR at 187-89 (Plaintiff’s testimony that he was able to drive to the hearing, is
23 able to perform household chores, such as vacuuming, cooking, cleaning, and
24 grocery shopping, spends most of the day “on the bed watching TV, play[ing] video
25 games,” and has about “five [good] days” in a week), 190-94, 413-18 (internal
26 medicine evaluation, dated April 12, 2007, finding Plaintiff’s “muscle tone, bulk,
27 and strength are normal” and “upper and lower extremity movements” are
28 “normal”), 468.)

1 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
2 **AFFIRMING** the decision of the Commissioner denying benefits.

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Dated: May 26, 2011



Hon. Jay C. Gandhi
United States Magistrate Judge