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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD D. JORGENSON,)	NO. CV 11-02407-MAN
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	AND ORDER
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on April 1, 2011, seeking review of the denial of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On April 27, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on December 5, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties' Joint Stipulation under submission without

1 oral argument.

2
3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
4

5 On March 10, 2008, plaintiff protectively filed an application for
6 a period of disability and DIB. (Administrative Record ("A.R.") 21.)
7 Plaintiff, who was born on November 25, 1957 (A.R. 25),¹ claims to have
8 been disabled since March 4, 2000, due to pain in his "shoulders, hip
9 and legs" (A.R. 21). Plaintiff has no past relevant work experience.²
10 (A.R. 25.)
11

12 After the Commissioner denied plaintiff's claim initially and upon
13 reconsideration (A.R. 21, 61-66, 68-74), plaintiff requested a hearing
14 (see A.R. 77-83). On May 5, 2009, plaintiff, who was represented by
15 counsel, appeared and testified at a hearing before Administrative Law
16 Judge Jeffrey A. Hatfield (the "ALJ"). (A.R. 21, 28-57.) Plaintiff's
17 mother Sharon Jorgenson and vocational expert Sydney Mathilde also
18 testified. (*Id.*) On September 9, 2009, the ALJ denied plaintiff's
19 claim (A.R. 21-27), and the Appeals Council subsequently denied
20 plaintiff's request for review of the ALJ's decision (A.R. 1-3). That
21 decision is now at issue in this action.
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25 ¹ On the date last insured, plaintiff was 47 years old, which is
26 defined as a younger individual. (A.R. 25; *citing* 20 C.F.R. §
404.1563.) Plaintiff is now in the closely approaching advanced age
category. (*Id.*)

27 ² Although the ALJ found that plaintiff has no past relevant
28 work experience, it does appear that plaintiff has prior work experience
as a tow truck driver. (*See, e.g.*, A.R. 35, 44-45.)

1 Based on this RFC assessment, as well as plaintiff's age,
2 education,³ work experience, and the testimony of the vocational expert,
3 the ALJ found that, through the date last insured, "there were jobs that
4 existed in significant numbers in the national economy that [plaintiff]
5 could have performed," including assembler, table worker, and film touch
6 up inspector. (A.R. 26.) Accordingly, the ALJ concluded that plaintiff
7 "was not under a disability . . . at any time from March 4, 2000, the
8 alleged onset date, through December 31, 2004, the date last insured."
9 (A.R. 26.)

10
11 **STANDARD OF REVIEW**
12

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
14 decision to determine whether it is free from legal error and supported
15 by substantial evidence in the record as a whole. Orn v. Astrue, 495
16 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
17 evidence as a reasonable mind might accept as adequate to support a
18 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
19 a mere scintilla but not necessarily a preponderance." Connett v.
20 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
21 record can constitute substantial evidence, only those 'reasonably drawn
22 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
23 1066 (9th Cir. 2006)(citation omitted).

24
25 Although this Court cannot substitute its discretion for that of
26 the Commissioner, the Court nonetheless must review the record as a

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28

³ The ALJ found that plaintiff has a limited education and is
able to communicate in English. (A.R. 25.)

1 whole, "weighing both the evidence that supports and the evidence that
2 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
3 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
4 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
5 responsible for determining credibility, resolving conflicts in medical
6 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
7 1035, 1039 (9th Cir. 1995).

8
9 The Court will uphold the Commissioner's decision when the evidence
10 is susceptible to more than one rational interpretation. Burch v.
11 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
12 review only the reasons stated by the ALJ in his decision "and may not
13 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
14 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
15 the Commissioner's decision if it is based on harmless error, which
16 exists only when it is "clear from the record that an ALJ's error was
17 'inconsequential to the ultimate nondisability determination.'" Robbins
18 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
19 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
20 at 679.

21 22 DISCUSSION

23
24 Plaintiff claims that the ALJ did not properly: (1) consider the
25 testimony of plaintiff; (2) consider the lay witness testimony of
26 plaintiff's mother, Sharon Jorgenson; and (3) assess plaintiff's RFC in
27 view of plaintiff's severe impairment of left shoulder tendonitis.
28 (Joint Stipulation ("Joint Stip.") at 4-12, 16-23, 27.)

1 **I. The ALJ Gave Clear And Convincing Reasons For Rejecting**
2 **Plaintiff's Testimony.**

3
4 Once a disability claimant produces objective medical evidence of
5 an underlying impairment that is reasonably likely to be the source of
6 claimant's subjective symptom(s), all subjective testimony as to the
7 severity of the symptoms must be considered. *Moisa v. Barnhart*, 367
8 F.3d 882, 885 (9th Cir. 2004); *Bunnell v. Sullivan*, 947 F.2d 341, 346
9 (9th Cir. 1991); *see also* 20 C.F.R. § 404.1529(a) (explaining how pain
10 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of
11 malingering based on affirmative evidence thereof, he or she may only
12 find an applicant not credible by making specific findings as to
13 credibility and stating clear and convincing reasons for each." *Robbins*
14 *v. SSA*, 466 F.3d 880, 883 (9th Cir. 2006). The factors to be considered
15 in weighing a claimant's credibility include: (1) the claimant's
16 reputation for truthfulness; (2) inconsistencies either in the
17 claimant's testimony or between the claimant's testimony and her
18 conduct; (3) the claimant's daily activities; (4) the claimant's work
19 record; and (5) testimony from physicians and third parties concerning
20 the nature, severity, and effect of the symptoms of which the claimant
21 complains. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
22 2002); *see also* 20 C.F.R. § 404.1529(c).

23
24 The ALJ found that plaintiff has the severe impairments of "status
25 post bilateral lower extremity crush injury and left shoulder
26 tendonitis." (A.R. 23.) The ALJ further found that while
27 "[plaintiff]'s medically determinable impairments could reasonably be
28 expected to cause the alleged symptoms[,] . . . [plaintiff]'s statements

1 concerning the intensity, persistence and limiting effects of these
2 symptoms are not credible to the extent they are inconsistent with the
3 above [RFC] assessment." (A.R. 25.) Because the ALJ cited no evidence
4 of malingering, the ALJ was required to provide clear and convincing
5 reasons for rejecting plaintiff's subjective allegations of pain and
6 functional limitations.

7
8 In rejecting plaintiff's testimony, the ALJ stated the following:

9
10 [T]he only medical records for the period from the alleged
11 onset date of March 4, 2000 through the date last insured of
12 December 31, 2004 are of two emergency room visits in February
13 2004. There is no evidence of regular and ongoing treatment
14 during that period. There is no evidence that [plaintiff]
15 required use of a wheelchair or other assistive device during
16 the period at issue.

17
18 (A.R. 25.)
19

20 Contrary to plaintiff's contention, the ALJ's reasons for rejecting
21 plaintiff's testimony are clear and convincing. First, the ALJ properly
22 notes that, during the period at issue, there is no evidence of regular
23 and ongoing treatment, and there are only two emergency room records.
24 See *Orn*, 495 F.3d at 638 (noting that "[o]ur case law is clear that if
25 a claimant complains about disabling pain but fails to seek treatment,
26 . . . an ALJ may use such failure as a basis for finding the complaint
27 unjustified or exaggerated"). Second, the ALJ properly considered the
28 lack of objective evidence to support plaintiff's alleged use of a

1 wheelchair or other assistive device during the period at issue. See,
2 e.g., *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)(noting that
3 “[a]lthough lack of medical evidence cannot form the sole basis for
4 discounting pain testimony, it is a factor that the ALJ can consider in
5 his credibility analysis”). Accordingly, because the ALJ provided clear
6 and convincing reasons for finding plaintiff’s testimony to be not
7 credible, no reversible error was committed.

8
9 **II. The ALJ Committed No Reversible Error In Considering The**
10 **Lay Witness Testimony Of Sharon Jorgenson.**

11
12 In evaluating the credibility of a claimant’s assertions of
13 functional limitations, the ALJ must consider lay witnesses’ reported
14 observations of the claimant. *Stout*, 454 F.3d at 1053. “[F]riends and
15 family members in a position to observe a claimant’s symptoms and daily
16 activities are competent to testify as to [the claimant’s] condition.”
17 *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §
18 404.1513(d) (“[W]e may also use evidence from other sources to show the
19 severity of your impairment(s). . . . Other sources include, but are
20 not limited to . . . spouses, parents and other caregivers, siblings,
21 other relatives, friends, neighbors, and clergy.”). “If an ALJ
22 disregards the testimony of a lay witness, the ALJ must provide reasons
23 ‘that are germane to each witness.’” *Bruce v. Astrue*, 557 F.3d 1113,
24 1115 (9th Cir. 2009)(citation omitted). Additionally, “the reasons
25 ‘germane to each witness’ must be specific.” *Stout*, 454 F.3d at 1054.
26 Lastly, where the ALJ’s error lies in a failure to properly discuss
27 competent lay testimony favorable to the claimant, a reviewing court may
28 find such error harmless if the lay witness testimony is

1 “inconsequential to the ultimate nondisability determination.” *Molina*
2 *v. Astrue*, ___ F.3d ___, 2012 U.S. App. LEXIS 6570, at *26, *45-*46 (9th
3 Cir. April 2, 2012)(*citing Carmickle v. Comm’r SSA*, 553 F.3d 1155, 1162
4 (9th Cir. 2008)).

5
6 As noted in the ALJ’s decision, at the May 5, 2009 administrative
7 hearing, plaintiff’s mother, Sharon Jorgenson, testified that: “she
8 lives with [plaintiff,] and she helps with the wheelchair”; and
9 plaintiff “lies down a lot and uses leg braces.” (A.R. 25.) In
10 considering Ms. Jorgenson’s testimony, the ALJ referenced his reason for
11 rejecting plaintiff’s testimony and similarly rejected Ms. Jorgenson’s
12 testimony, because “there [w]as no evidence that [plaintiff] required
13 use of a wheelchair or other assistive device during the period from
14 March 4, 2000 through December 31, 2004.” (A.R. 25.) In other words,
15 the ALJ rejected the testimony of Ms. Jorgenson, because it was not
16 supported by the medical record.

17
18 It is unclear under Ninth Circuit case law whether an ALJ may
19 summarily reject lay testimony, because it is not supported by objective
20 medical findings. Specifically, one strand of cases in the Ninth
21 Circuit suggests that such a finding by the ALJ constitutes a sufficient
22 reason. See, e.g., *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.
23 2001)(“One reason for which an ALJ may discount lay testimony is that it
24 conflicts with medical evidence”); see also *Bayliss v. Barnhart*, 427
25 F.3d 1211, 1218 (9th Cir. 2005)(“An ALJ need only give germane reasons
26 for discrediting the testimony of lay witnesses. Inconsistency with
27 medical evidence is one such reason.”). Another line of cases suggests
28 that it is not. See, e.g., *Bruce*, 557 F.3d at 1116 (“Nor under our law

1 could the ALJ discredit her lay testimony as not supported by medical
2 evidence in the record.")(citing Smolen v. Chater, 80 F.3d 1273, 1289
3 (9th Cir. 1996)).

4
5 Assuming *arguendo* that the ALJ committed error in rejecting the lay
6 testimony of Ms. Jorgenson, such error was harmless. As discussed
7 *supra*, the ALJ properly discredited plaintiff's testimony -- testimony
8 which was substantially similar to that of Ms. Jorgenson -- not only
9 because it was not supported by the medical record but also because
10 plaintiff failed to seek regular and ongoing treatment despite his
11 allegedly disabling impairments. Accordingly, as in Molina v. Astrue,
12 because Ms. Jorgenson's testimony regarding plaintiff's limitations was
13 similar to plaintiff's own testimony, and because the ALJ provided clear
14 and convincing reasons for discounting plaintiff's testimony, the ALJ
15 likewise provided sufficient reasons for rejecting Ms. Jorgenson's
16 testimony. 2012 U.S. App. LEXIS 6570, at *46 (finding the "ALJ's
17 failure to give specific witness-by-witness reasons for rejecting the
18 lay witness testimony" to be harmless, "[b]ecause the ALJ had validly
19 rejected all the limitations described by the lay witnesses in
20 discussing [the claimant's] testimony"); see also, Valentine v. Comm'r
21 SSA, 574 F.3d 685, 694 (9th Cir. 2009)(holding that because "the ALJ
22 provided clear and convincing reasons for rejecting [the claimant's] own
23 subjective complaints, and because [the lay witness's] testimony was
24 similar to such complaints, it follows that the ALJ also gave germane
25 reasons for rejecting [the lay witness's] testimony"). As such, there
26 is no reversible error.

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1 III. The ALJ Committed No Reversible Error In Assessing
2 Plaintiff's RFC.

3
4 Plaintiff contends that the ALJ did not assess his RFC properly in
5 view of his severe impairment of left shoulder tendonitis. (Joint Stip.
6 at 5-13, 16.) Specifically, plaintiff claims that the ALJ committed
7 legal error, because despite "find[ing] the presence of a severe upper
8 extremity impairment[,] . . . [the ALJ] fail[ed] to impose any
9 limitations as a result of that severe impairment in [his RFC]
10 assessment." (*Id.* at 5.)

11
12 As discussed above, at step two, the ALJ found that plaintiff has
13 the severe impairments of "status post bilateral lower extremity crush
14 injury and left shoulder tendonitis." (A.R. 23.) In determining
15 plaintiff's RFC, the ALJ summarized plaintiff's medical record during
16 the period at issue. In pertinent part, the ALJ noted, *inter alia*, that
17 plaintiff had two emergency room visits between March 4, 2000, through
18 his last insured date of December 31, 2004. (A.R. 24.) With respect to
19 the first emergency room record, dated February 7, 2004, the ALJ noted
20 that plaintiff complained of "left shoulder pain status post accident a
21 few months ago. . . . [and that] [x]-rays revealed mild degenerative
22 changes without evidence of acute fracture or dislocation." (*Id.*)
23 Regarding the second emergency room record, dated February 27, 2004, the
24 ALJ noted that plaintiff "complain[ed] of left shoulder and hand pain
25 and swelling for three weeks. [Plaintiff] was diagnosed with left
26 shoulder sprain." (*Id.*) Taking into account this evidence -- *to wit*,
27 "the evidence from the period from March 4, 2000 through the date last
28 insured of December 31, 2004, as discussed above" -- and "[plaintiff]'s

1 history of bilateral lower extremity injury[,]” the ALJ determined that
2 plaintiff has the RFC to, *inter alia*, “lift and carry 20 pounds
3 occasionally and 10 pounds frequently.” (A.R. 25; emphasis added.)
4

5 As noted above, the ALJ specifically considered plaintiff’s severe
6 impairment of left shoulder tendonitis in assessing plaintiff’s RFC.
7 Contrary to plaintiff’s contention, by limiting plaintiff to lifting no
8 more than 10 pounds frequently and 20 pounds occasionally -- *to wit*,
9 light work⁴ -- the ALJ imposed limitations related to plaintiff’s
10 impairment. Indeed, as the Commissioner properly notes, beyond
11 complaining generally about pain in his shoulder, plaintiff does not
12 point to, and the record does not support, limitations greater than
13 those found by the ALJ. Moreover, the ALJ properly rejected plaintiff’s
14 testimony to the extent it was inconsistent with the ALJ’s RFC
15 assessment.⁵ Accordingly, the ALJ committed no reversible error in
16 assessing plaintiff’s RFC.
17

18 CONCLUSION

19
20 For the foregoing reasons, the Court finds that the Commissioner’s
21 decision is supported by substantial evidence and is free from material
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23 ⁴ Pursuant to 20 C.F.R. § 404.1567(b), light work is defined as
24 “lifting no more than 20 pounds at a time with frequent lifting or
25 carrying of objects weighing up to 10 pounds.”

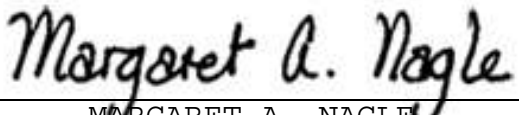
26 ⁵ Plaintiff cites the cases of Bray v. Comm’r of SSA, 554 F.3d
27 1219 (9th Cir. 2009), and Hoopai v. Astrue, 499 F.3d 1071 (9th Cir.
28 2007), in support of his contention that the ALJ cannot find a severe
impairment yet avoid including any limitations as a result of the severe
impairment in assessing plaintiff’s RFC. (Joint Stip. at 9-12.)
However, as noted *supra*, the ALJ properly limited plaintiff to light
work in view of his severe impairment of left shoulder tendonitis, and
thus, plaintiff’s contention is unavailing.

1 legal error. Neither reversal of the Commissioner's decision nor remand
2 is warranted.

3
4 Accordingly, IT IS ORDERED that Judgment shall be entered affirming
5 the decision of the Commissioner of the Social Security Administration.
6 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of
7 this Memorandum Opinion and Order and the Judgment on counsel for
8 plaintiff and for defendant.

9
10 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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12 DATED: May 9, 2012

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16 MARGARET A. NAGLE
17 UNITED STATES MAGISTRATE JUDGE
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